Supreme Court, U.S.
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In The

Supreme Court of the United States

RICHARD D. COHEN,

Petitioner,

v.

WORLD OMNI FINANCIAL CORP.,

Respondent.

On Petition For A Writ Of Certiorari To The Circuit Court Of The Fifteenth Judicial Circuit In And For Palm Beach County, Florida

PETITION FOR A WRIT OF CERTIORARI

RICHARD D. COHEN
21870 Cartagena Dr.
Boca Raton, Florida 33428
(561) 883-6227
Counsel of Record for Petitioner

QUESTION PRESENTED

Whether a state's refusal to grant a tax credit against its use tax for a sales tax previously paid to another state on the same value or activity violates the dormant Commerce Clause of the United States Constitution; and if so, whether the type of transaction, *e.g.*, sale, lease, etc., involved is constitutionally irrelevant to this question.

PARTIES TO THE PROCEEDING

Petitioner, who was the defendant below, is Richard D. Cohen, of Boca Raton, Florida.

Respondent, who was the plaintiff below, is World Omni Financial Corp., of Deerfield Beach, Florida.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

The petitioner is not a corporation.

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OPINIONS BELOW

The decision of Appellate Division of the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida, for which review is being sought is unreported and reproduced in the Appendix at App. 1. The decision of the County Court in and for Palm Beach County, Florida, granting summary judgment dismissing petitioner's counterclaims is also unreported and reproduced in the Appendix at App. 2. The decision of the County Court in and for Palm Beach County, Florida, granting summary judgment on respondent's complaint is also unreported and reproduced in the Appendix at App. 3.

JURISDICTION

The judgment of the Appellate Division of the Circuit Court of the Fifteenth Judicial District in and for Palm Beach County, Florida, was entered on August 2, 2004. A timely motion for rehearing thereof was denied on August 31, 2004 (App. 4).

On September 29, 2004, petitioner filed a timely petition for a writ of certiorari with the District Court of Appeal of the State of Florida, Fourth District, which was denied on February 15, 2005 (App. 5). A timely motion for rehearing thereof was denied on March 29, 2005 (App. 6). The present petition is timely filed under 28 U.S.C. §2101(c) and under Rules 13.1 and 13.3 of this Court.

This Court's jurisdiction is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution, U.S. Const., art. I, §8, cl. 3, provides: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several states, and with Indian Tribes."

New York Tax Law §1111(i) provides, in pertinent part, that "all receipts due or consideration given or contracted to be given for such property under and for the entire period of such lease . . . shall be deemed to have been paid or given and shall be subject to tax, and any such tax shall be collected, as of the date of first payment under such lease . . . or the date of registration of such property with the commissioner of motor vehicles, whichever is earlier."

§212.06(7), Fla. Stat., provides, in pertinent part, that "the provisions of this chapter [imposing sales and use tax] do not apply in respect to the use or consumption of tangible personal property . . . for use or consumption in this state, upon which a like tax equal to or greater than the amount imposed by this chapter has been lawfully imposed and paid in another state, territory of the United States, or the District of Columbia."

§212.06(8)(a), Fla. Stat., provides, in pertinent part, that "use tax will apply and be due on tangible personal property imported or caused to be imported into this state for use . . . in this state; provided, however, that . . . it shall be presumed that tangible personal property used in another state, territory of the United States, or the District of Columbia for 6 months or longer before being imported into this state was not purchased for use in this

state. The rental or lease of tangible personal property which is used or stored in this state shall be taxable without regard to its prior use or tax paid on purchase outside the state."

STATEMENT OF THE CASE

The facts of this case are undisputed,[1] and are typical of millions of other individuals throughout the nation who lease their cars in one state, prepay the required sales tax for the full lease term to that state, then move to another state which imposes its own use tax upon them without credit for the sales tax previously paid to the first state, and are thus subjected to cumulative – and discriminatory – sales and use tax burdens.

At issue in this case is whether a state's denial of tax credit against its use tax for the sales tax previously paid to another state on the same value or activity violates the dormant Commerce Clause of the United States Constitution.[2] The Court has been flirting with this question for nearly seventy years.[3] Although the Court has answered the question in the affirmative in dicta and implicitly through the application of its internal consistency doctrine, it has never explicitly done so. To be sure, every one

[1] The first court below expressly found that "there is no genuine issue as to any material fact" (App. 3a).

[2] Subsumed within this main inquiry is the related, but analytically distinct, subordinate inquiry of whether the type of transaction, *e.g.*, sale, lease, etc., is constitutionally irrelevant to the main inquiry. We submit that this too should be answered in the affirmative.

[3] The Court first broached the question in *Henneford v. Silas Mason Co.*, 300 U.S. 577, 587 (1937).

of the 45 states (including Florida) and the District of Columbia[4] that impose sales and use tax statutorily provide for tax credit for sales or use taxes paid to other states.[5] This tax credit is designed to equalize the tax burden between interstate and intrastate activity thus assuring that the sale and use of property is, in principle, taxed just once whether or not the property crosses state lines. We cannot improve upon the Court's own description of this statutory credit pattern in *Oklahoma Tax Commission v. Jefferson Lines*, 514 U.S. 175, 194 (1995):

> These credit provisions create a national system under which the first state of purchase or use imposes the tax. Thereafter, no other state taxes the transaction unless there has been no prior tax imposed . . . or if the tax rate of the prior taxing state is less, in which case the subsequent taxing state imposes a tax measured only by the differential rate (*internal quotations and citations omitted*).

Although this is how the statutory credit pattern is supposed to operate, the intended tax parity is destroyed – and discrimination against interstate commerce necessarily results – when the second state subjects leased property to its own use tax on the periodic lease payments

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[4] Although the District of Columbia is technically not a state, this distinction is irrelevant to the issue presented. Therefore, for ease of exposition, all references to a "state" shall be deemed to also include the District of Columbia.

[5] *RIA All States Tax Guide* ¶256. Some of these credits are technically drawn as exemptions for property that previously has been subject to sales and use tax in other states. For ease of exposition, however, we shall refer to both types of provisions as "credits", in keeping with the way that such provisions are generally described by the cases and commentary.

accruing while the property is used in that state without providing tax credit for the sales tax previously paid on the entire stream of lease payments for the entire lease term to the first state where the lease was originated. Various state tax commissioners, including the Florida Department of Revenue ("FLDOR") in this case, are as a matter of policy, routinely and systematically directing licensed dealers[6] (who are charged with the tax collection function) (including respondent dealer) to deny tax credit against Florida use tax to interstate lessees (such as petitioner) for the sales tax that they previously paid upfront to another state when they entered into their leases. This policy is openly expressed in a series of Technical Assistance Advisements ("TAA") promulgated by the FLDOR, one of which is reproduced in the Appendix at App. 7.

In 1995, the petitioner, then a resident of New York, leased a car from the respondent dealer. The jurisdiction where a lease originates will often assert the right to impose a sales tax on all lease payments due under the lease, even where the leased property will be used outside the jurisdiction.[7] New York did – and still does – exactly that. As explained in 20 NYCRR §527.15:

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[6] §212.06(2)(e), Fla. Stat., defines a "dealer" as "any person . . . who leases or rents tangible personal property . . . for consideration, permitting the use or possession of such property without transferring title thereto . . . " §212.07(1)(a), Fla. Stat., in turn, requires that sales/use tax "be collected by the dealers from the purchaser or consumer."

[7] See *Intel Containers Int'l v. Huddleston*, 507 U.S. 60 (1993). Other populous states (besides New York) that impose sales tax on leases upfront include, without limitation, Texas, Ohio and Illinois.

> Section 1111(i) of the Tax Law provides special rules for the payment of sales and use tax on certain leases of motor vehicles, vessels and noncommercial aircraft. Rather than the tax being due upon each periodic lease payment, the Tax Law provides that . . . the tax is due at the inception of the lease on the total amount of the lease payments for the entire term of the lease.

Accordingly, the New York sales tax (at the then prevailing rate of 8½%) on the entire stream of lease payments for the entire 36-month lease term was paid at the inception of the lease. A little over a year later, in 1996, the petitioner moved to Florida taking the leased car with him, whereupon the respondent dealer, consistent with the FLDOR policy directive inherent in the TAA, sought to collect Florida use tax (at the then prevailing rate of 6%) from petitioner on each of the remaining periodic monthly lease payments, refusing to give him tax credit for the New York sales tax previously paid on those same lease payments. Respondent dealer thus sought to impose a cumulative tax burden upon petitioner of 14½% (8 ½% New York tax plus 6% Florida tax) as compared to the purely intrastate Florida lessee who pays but a single 6% tax. Petitioner, having previously paid 8½% New York sales tax on the entire stream of lease payments for the entire lease term, disputed and refused to pay the additional 6% Florida use tax. Approximately 20 months later, in 1998, the respondent dealer declared the lease in default based solely upon the unpaid Florida use tax for the 20-month period and repossessed the car.

In early 2000, the respondent dealer sued petitioner in the Palm Beach County Court for breach of contract asserting as the sole basis for the alleged breach the petitioner's nonpayment of the Florida use tax and seeking

recovery of the unpaid Florida use tax as part of its damages (R[8]-I, 1-10).[9] Petitioner answered and counterclaimed, asserting that it was the respondent dealer who instead breached the lease by repossessing the car based solely upon the unpaid Florida use tax, since petitioner was entitled to, but was not given, tax credit against the Florida use tax for the New York sales tax that he previously paid in full at the inception of the lease (R-I, 11-20).

Petitioner timely and properly raised the federal question presented here, *i.e.*, that Florida's refusal to give tax credit against its use tax for sales tax previously paid to another state violates the dormant Commerce Clause of the Federal Constitution, no fewer than seven times in the three Florida courts below. In each instance, the Florida courts below buried their head ostrich-like in the sands of oblivion, pretending as though the federal question was never raised. Consistent with Rule 14(g)(i) of this Court, the following narrative describes each of the seven instances in which the petitioner raised the federal question.

Petitioner initially raised the federal question in the court of first instance, *i.e.*, Palm Beach County Court, in his response to the respondent dealer's initial summary judgment motion (R-II, 164-212). In mid-2000, respondent dealer moved for summary judgment dismissing petitioner's counterclaims, relying upon the TAA (App. 7) in support of its assertion that it was required by FLDOR to

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[8] References to "(R-)" refer to the Record on Appeal in the Appellate Division of the Circuit Court with the appropriate volume and page number noted.

[9] §212.07(2) provides, in pertinent part, that "such tax . . . shall be a debt from the purchaser or consumer, until paid, and shall be recoverable at law in the same manner as other debts."

collect Florida use tax from petitioner on the lease payments accruing while the car was in Florida notwithstanding petitioner's previous payment of New York sales tax for the entire lease term (R-I, 106-131). The TAA addresses an identical but otherwise unrelated case involving another individual who, like the petitioner, paid New York sales tax on the entire stream of lease payments for the entire lease term, and later moved to Florida with his leased car. The TAA concludes that this individual was not entitled to tax credit for the New York sales tax previously paid and that his lessor was correct in charging Florida use tax (App. 15a). In his response to the motion, petitioner pointed out that the TAA arrives at that conclusion by confusing Florida's unlimited statutory credit provision (§212.06(7), Fla. Stat.) with Florida's other (and more limited) use tax exemption (for property purchased outside the state by former nonresidents if the property has been used outside the state for six months or longer before being imported into Florida) (§212.06(8)(a), Fla. Stat.). Petitioner argued that by denying tax credit to interstate lessees and thereby subjecting them to cumulative sales and use taxes not similarly borne by intrastate lessees, the TAA construes the statute in a way that violates the cardinal Commerce Clause requirement of nondiscrimination. The petitioner cited *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977) (establishing the four-prong test for the constitutionality of a state tax), *Container Corp. v. Franchise Tax Board*, 463 U.S. 159, 169 (1983) (establishing the internal consistency test for determining whether a tax unconstitutionally discriminates against interstate commerce; to be internally consistent, a state tax must impose no greater burden upon interstate commerce than intrastate commerce), and *Jefferson Lines*, 514 U.S. 175 (reaffirming the internal consistency doctrine). Completely

ignoring these binding precedents (and the federal question itself), the County Court concluded that petitioner was not entitled to tax credit against Florida use tax for the New York sales tax previously paid (and implicitly concluded that petitioner thus defaulted on the lease by not paying the Florida tax), and granted summary judgment to respondent dealer (App. 2).

Petitioner raised the federal question for the second time in early 2001 when he made a motion (still in the court of first instance) for leave of court to amend his answer to assert the federal question as an affirmative defense (R-II, 305-340). The County Court denied petitioner's motion without acknowledging the federal question (R-II, 341).

A month or so later, the County Court granted respondent dealer's further motion for final summary judgment on the complaint stating that "the court has previously ruled that [petitioner] defaulted" (App. 3). After a brief evidentiary hearing in 2003 on the issue of damages, the court entered final judgment against the petitioner (R-XIX, 301).

Petitioner raised the federal question for the third time in the appellate briefs submitted in his appeal to the Appellate Division of the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida (and at oral argument thereon). The petitioner argued that the lower court, in holding that petitioner was not entitled to tax credit for the New York sales tax previously paid, construed the statute in a way that violates the Commerce Clause. The petitioner relied principally upon this Court's decision in *Jefferson Lines*, 514 U.S. 175, which reaffirmed the internal consistency doctrine and also strongly implies,

albeit in dicta, that tax credit against use tax for sales tax previously paid to another state is constitutionally required.[10] The petitioner also relied upon *Barringer v. Griffes*, 1 F.3d 1331 (2d Cir. 1993), *cert. denied*, 510 U.S. 107 (1994), which applied the internal consistency doctrine in invalidating Vermont's denial of tax credit against its use tax for motor vehicles registered in the state for sales taxes paid to another state where the vehicle was previously registered. In reaching that result, the *Barringer* Court observed: "absent a credit for taxes paid in other states, multiple taxation would heavily burden vehicles transported in interstate commerce, precisely the result that the Commerce Clause was designed to prevent." *Id.* at 1337. The petitioner also relied upon *Dep't of Revenue v. Kuhnlein*, 646 So.2d 717 (Fla. 1994), a decision from Florida's own Supreme Court explicitly adopting this Court's internal consistency doctrine. The *Kuhnlein* Court explained that in order to avoid an internal consistency problem, "Florida law [referring to §212.06(7), Fla. Stat.] provides that, once use tax is applicable, credit must be given for any "like tax" paid to another American jurisdiction that is equal to or greater than Florida's tax." *Id.* at 723. Petitioner also pointed out that the type of transaction, *e.g.*, sale, lease, etc., in which the original sales tax was paid is irrelevant to the Commerce Clause analysis. The Circuit Court not only ignored these authorities but also ignored the federal question altogether in affirming the lower court's judgments *per curiam* (without issuing written opinion) (App. 1).

The petitioner raised the federal question for the fourth time in his motion for rehearing/request for a

[10] For more extensive treatment, see pp. 18-21, *infra*.

written opinion, in which he again cited *Jefferson Lines* for the proposition that under Commerce Clause requirements "use tax would not apply when another state's sales tax had previously been paid, or would apply subject to credit for such payment." *Jefferson Lines*, 514 U.S. at 194. The Circuit Court denied petitioner's motion for rehearing without acknowledging the federal question (App. 4).

Petitioner raised the federal question for the fifth time in his timely petition for a writ of certiorari to the District Court of Appeal of the State of Florida, Fourth District. In his petition, petitioner essentially repeated the arguments made in the courts below. The court denied the petition without acknowledging the federal question (App. 5). Petitioner raised the federal question for the sixth time in his motion for rehearing that the court denied without acknowledging the federal question (App. 6).

Petitioner raised the federal question for the seventh – and final – time in his request to the District Court of Appeal of the State of Florida, Fourth District, for certification that the federal question was raised and necessarily decided in the Florida courts below. In support of that request, petitioner pointed to each of the six previous instances in which the federal question was raised. The court denied the request for certification without acknowledging the federal question (App. 6).[11]

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[11] Because the District Court of Appeal of the State of Florida did not issue a written opinion in connection with its denial of certiorari, the petitioner is precluded under the Florida Constitution from seeking Florida Supreme Court review. See Art. V, §3(b)(3), Fla. Const.

REASONS FOR GRANTING THE WRIT

I. THIS CASE SQUARELY PRESENTS AN ISSUE THAT THE COURT PREVIOUSLY FOUND TO BE CERTWORTHY.

Twenty years ago, in *Williams v. Vermont*, 472 U.S. 14 (1985), the Court granted certiorari on the same Commerce Clause issue presented here as well as an equal protection issue. The *Williams* Court resolved the case on equal protection grounds, noted its narrow holding and concluded by emphasizing what it did not decide: "This Court has expressly reserved the question whether a State must credit a sales tax paid to another state against its own use tax." *Id.* at 21-22 (citing *Henneford*, 300 U.S. at 587). The *Williams* Court, while noting that such a requirement had significant support in the commentary,[12] put aside the question leaving it open for future resolution. *Id.* at 22. This question has been percolating for almost seventy years since Justice Cardozo first posited it in *Henneford*. During – and perhaps as a result of – the Court's dormancy on the question, various state tax authorities, including FLDOR here, have operated as though there were no constitutional requirement for credit. This has resulted in millions of interstate lessees being subjected to cumulative – and discriminatory – sales

[12] Citing, *inter alia*, J. Hellerstein & W. Hellerstein, *State and Local Taxation* 637-638 (4th ed. 1978). Professor Walter Hellerstein is the country's leading commentator on state and local taxation. His treatise is generally regarded as the "bible" of state taxation and is frequently cited by this Court. See, *e.g.*, *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 463 (citing Hellerstein treatise); *Jefferson Lines*, 514 U.S. at 180, 194 (citing Hellerstein treatise). Professor Hellerstein's more recent commentary on the issue is contained in the current edition of his treatise, *State Taxation* ¶18.08[2] (3rd ed. 2003).

and use tax burdens. The time is now ripe for the Court to reassert its authority and fully settle this question; this case presents the ideal vehicle for doing so.

II. THIS CASE PRESENTS ISSUES OF NATIONAL IMPORTANCE, GOING TO THE HEART OF THE INTERESTS PROTECTED BY THE COMMERCE CLAUSE.

It must be conceded at the outset that there is no *express* conflict between the decision below and other appellate courts. Nor could there be; a conflict cannot be created where, as here, the court below simply ignores the federal question. A state court's refusal or failure to articulate its denial of the federal claim is just as reviewable as an express decision on the point. It is enough that "the necessary effect of the judgment has been to deny the claim." *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928). See also, *Chambers v. Mississippi*, 410 U.S. 284, 290 n. 3 (1973); *Street v. New York*, 394 U.S. 576, 581-585 (1969).

The Court, recognizing the vital interests protected by the Commerce Clause, has repeatedly signaled its distaste for discriminatory state taxing schemes by granting certiorari in numerous other cases raising similar interstate commerce concerns even in the absence of an asserted conflict among appellate courts. See, *e.g.*, *American Trucking Ass'ns v. USF Holland* (Case No. 03-1230); *Hillside Diary, Inc. v. Lyons*, 539 U.S. 59 (2003); *Camps Newfoundland/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564 (1997); *General Motors v. Tracy*, 519 U.S. 278 (1997); *American Trucking Ass'ns v. Scheiner*, 483 U.S. 266 (1987).

This case presents a question whose resolution will have immediate importance far beyond the facts and parties involved. The decision below sanctions the cumulative – and discriminatory – sales and use tax burdens which result from FLDOR's practice of directing licensed dealers, including the respondent dealer, to collect use taxes from interstate lessees, such as the petitioner, without tax credit for the sales taxes that they previously paid to another state. Florida is not alone in this practice. The practice is far more pervasive; other states, including most notably California, also engage in the same discriminatory practice of imposing its own use tax upon lessees migrating to that state from other states without giving them tax credit for the sales tax that they previously paid upfront to such other states.[13]

If the decision below is left standing, other state tax commissioners not currently engaged in this discriminatory practice will then adopt it. This will inevitably lead to the proliferation of cumulative sales and use taxes on a nationwide basis; every state would then tax the use of property within its borders irrespective of the sales tax previously paid to another state. In such an environment, no rational consumer would ever purchase (or lease) property in any state other than the state in which they intend to use that property, knowing that if they did, they would have to pay two taxes; first a sales tax in the state of purchase (or lease) and then a use tax in the state of use. Instead of having a national common-market economy where consumers in one state freely do business

[13] See, *e.g.*, *In the Matter of the Petition of Sandra Ann Torquato*, New York Tax Appeals Tribunal, 2000 N.Y. Tax LEXIS 283 (2000), which is reproduced in the Appendix at App. 8.

with merchants in any other state, we would have 51 economically Balkanized states (including the District of Columbia) where consumers in one state, to avoid double taxation, would only do business with merchants in that same state.

To illustrate the breadth of the problem, and thus the importance of the issue presented, we endeavor here to quantify the number of interstate lessees who, like petitioner, have been caught in the morass of cumulative sales and use taxes. While it is neither necessary nor appropriate – nor for that matter, even possible – within the context of this petition to catalogue each of the cumulative sales and use tax burdens that might potentially result from each of the 2,070 possible permutations of state-to-state migration (a citizen of any one of the 46 jurisdictions that impose sales/use tax could move to any one of the other 45 jurisdictions that impose sales/use tax; 46 multiplied by 45 equals 2070), for our purposes here, it is sufficient to note that the problem exists among three of the nation's most populous states (New York, California and Florida). We have thus limited the analysis that follows to these three states. The problem appears to be most pronounced between New York and Florida (as in this case) since New York, which imposes its sales tax on leases upfront, has the largest outmigration to nearly every other state (especially Florida), whereas Florida, which imposes its sales/use tax on leases on a periodic basis, has the largest inmigration from nearly every other state (especially New York).[14] According to the U.S. Census Bureau, during the 1995-2000 period, some 308,230 people

[14] U.S. Census Bureau, *State-to-State Migration Flows: 1995-2000* (2003), available at http://www.census.gov/prod/2003pubs/censr-8.pdf

migrated from New York to Florida (mostly elderly retirees), and an additional 95,952 people migrated from New York to California.[15] According to leasing industry statistics, during this same period, leasing accounted for roughly 30% of all new car acquisitions.[16] Using official government statistics as to the average number of persons per household (2.59)[17] and the average number of vehicles per household (1.9),[18] we are thus able to calculate that, during this same 1995-2000 period, in excess of 88,000 lessees moved from New York to either of Florida or California. We note that this analysis understates – probably substantially so – the full impact of the problem since the analysis does not consider the leasing of boats and noncommercial aircraft which are also subject to the accelerated payment of sales tax in New York. This estimate involves only three states (6 permutations of state-to-state migration) over a five-year period. When one considers the remaining number of permutations (2064) of state-to-state migration that were not considered in deriving this estimate and broadens the timeframe beyond the five-year period sampled, it is hardly a stretch to conclude that millions of interstate lessees have been – and continue to be – subjected to cumulative sales and use taxes.

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[15] *Id.*

[16] Source: CNW Marketing/Research, *Consumer New Vehicle Leasing, Lease Share: of Retail, 1990-2004.*

[17] U.S. Census Bureau, *People QuickFacts* (2003), available at http://quickfacts.census.gov/qfd/states/00000.html

[18] U.S. Dept. of Transportation, Federal Highway Administration, *Average Number of Vehicles and Vehicle Travel Per Household* (2001).

Several macroeconomic and demographic factors combine to all but assure that the problem of cumulative sales and use taxes will only grow worse, underscoring the need for a nationally binding rule of law requiring the provision of tax credit against the a state's use tax for sales taxes previously paid to another state irrespective of the type of transaction involved. The first factor is the overwhelming dominance of sales and use tax as a state revenue source. Using Florida as an example, for the most recent fiscal year, sales and use taxes accounted for a record 70% of the state's gross revenues.[19] The second factor is the even greater dominance of personal consumption expenditures, *i.e.*, retail sales, as a percentage of GDP. For the most recent period, personal consumption expenditures accounted for a record 70% of GDP.[20] The third factor is the dominance of auto sales (and leases) as a percentage of retail sales. Again using Florida as an example, in 2003, auto dealership sales (and leases) accounted for nearly 23% of overall retail sales in the state.[21] The fourth factor is the significant use of leasing as a means of auto acquisition, accounting for approximately 30% of all new car acquisitions. The fifth factor is the ever-accelerating trend in state-to-state migration. Again using Florida as an example, during the 90's, migration accounted for 85.3% of the state's population increase whereas in the more recent period from April 1, 2000 to April 1, 2004, migration

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[19] Source: Florida Dept. of Revenue, *2003-04 Annual Report*.

[20] Source: Federal Reserve Bank of St. Louis, available at http://research.stlouisfed.org/fred2/series/GDP/18.

[21] Source: National Automobile Dealers Association (NADA), Industry Analysis Division, *Relationship of new-car dealerships to total retail trade in 2003, by state*.

accounted for 89.5% of the state's population increase.[22] As each of these trends continue to accelerate, so too does the potential for the imposition of cumulative sales and use taxes, further underscoring the necessity for a resolution of the issue presented by this case.

III. THE DECISION BELOW COMPLETELY IGNORES THIS COURT'S COMMERCE CLAUSE JURISPRUDENCE.

Petitioner relied upon the four-part Commerce Clause test first articulated in *Complete Auto Transit* under which a state tax will be deemed unconstitutional unless it "[1] is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State." *Jefferson Lines*, 514 U.S. at 183 (quoting *Complete Auto Transit*, 430 U.S. at 279). This case involves the second and third prongs of the *Complete Auto* standard, the requirements of apportionment and nondiscrimination.

Satisfaction of these requirements, in turn, may be determined by application of what the Court has termed the "internal consistency" test. As the Court explained:

> Internal consistency is preserved when the imposition of a tax identical to the one in question by every other State could add no burden to interstate commerce that intrastate commerce would not also bear. This test asks nothing about the

[22] Office of Economic and Demographic Research, Florida Legislature, *Florida Demographic Summary* (2005), at http://www.state.fl.us/edr/population/popsummary.pdf

> degree of economic reality reflected by the tax, but simply looks to the structure of the tax at issue to see whether its identical application by every other State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate.

Jefferson Lines, 514 U.S. at 185. Because a state tax that fails the internal consistency test places interstate commerce at an insuperable structural disadvantage, failure of that test demonstrates that the tax both discriminates against interstate commerce and is malapportioned. See *Tyler Pipe Indus., Inc. v. Washington State Dep't of Revenue*, 483 U.S. 232, 247 (1987) (noting the test's application to both the nondiscrimination and apportionment requirements).

The conclusion that a state is constitutionally required to provide credit against its own use taxes for sales taxes paid to other states follows inexorably from the simple application of the internal consistency principle. If one views use taxes in conjunction with the sales taxes for which they compensate, the sales-use tax scheme would subject the purchase (or lease) of goods in one state for use in another to two exactions – a sales tax in the state of purchase (or lease) and a use tax in the state of use. The purchase (or lease) of goods for local use, however, would be subject to only a sales tax. If one views use taxes in isolation from the sales taxes, use taxes would still subject the interstate user to the risk of multiple taxation not borne by their intrastate counterpart. The interstate user pays a tax in each state in which the property is used whereas the intrastate user using the property in an identical fashion, except not across state lines, would pay but a single tax. Under either view of the use tax, the

competitive disadvantage to interstate commerce is self-evident. As Justice Scalia observed in *Tyler Pipe*, if the Court "had applied an internal consistency rule" in *Williams*, 472 U.S. 14, where the Court found it unnecessary to reach the question of whether a state must credit a sales paid to another state against its own use tax, "the need for such a credit would have followed as a matter of mathematical necessity." *Tyler Pipe*, 483 U.S. at 255 (Scalia, J., concurring in part and dissenting in part). Applying the internal consistency test, the Second Circuit similarly noted "absent a credit for taxes paid in other states, multiple taxation would heavily burden vehicles transported in interstate commerce, precisely the result the Commerce Clause was designed to prevent." *Barringer*, 1 F.3d at 1337.

The type of transaction (*e.g.* sale, lease, etc.) in which the original sales tax was paid is constitutionally irrelevant to the main question presented here, *i.e.*, whether a state's failure to provide credit against its use tax for sales tax previously paid to another state violates the dormant Commerce Clause. The internal consistency doctrine is consistent in its application across the entire spectrum of consumer and commercial transactions, including leases; the doctrine does not discriminate among transaction types in determining whether a tax discriminates against interstate commerce.

The Court's opinion in *Jefferson Lines* reinforces the conclusion that states have a constitutional obligation to provide a credit against their own use taxes for sales or use taxes paid to other states. The *Jefferson Lines* Court declared that "equality of treatment between interstate and intrastate activity has been the common theme among

the paired (or 'compensating') tax schemes that have passed constitutional muster" and noted that in upholding taxing schemes providing for credits for taxes on in-state transactions, it had "often pointed to the concomitant credit provisions for taxes paid out-of-state as supporting our conclusion that a particular tax passed muster because it treated out-of-state and in-state taxpayers alike." *Jefferson Lines*, 514 U.S. at 193 n. 6. The *Jefferson Lines* Court also noted that it had "never upheld a tax in the face of a substantiated charge that it provided credits for the taxpayer's payment of in-state taxes, but failed to extend such a credit for out-of-state taxes." *Id.* Under Commerce Clause requirements, use tax "presumably . . . would not apply when another State's sales tax had been previously paid, or would apply subject to a credit for such payment." *Id.* at 194.

The decision below construes the statutory framework as, in effect, creating a special rule for the tax treatment of out-of-state leases ("the rental or lease of tangible personal property which is used or stored in this state shall be taxable without regard to its prior use or tax paid on purchase *outside the state*") (*emphasis supplied*) that cannibalizes the statutory credit provision (§212.06(7), Fla. Stat.) (App. 3a-4a). Construed this way, the statute discriminates *on its face* against interstate commerce since it only disallows credit for tax paid *outside the state*, thus explicitly subjecting out-of-state lessees to higher tax burdens than local lessees. Such a facially discriminatory construction would, of course, render the statute invalid

per se.[22] See *Camps Newfoundland*, 520 U.S. 564. But that is not the proper statutory construction.

It is a cardinal rule of statutory construction that when two or more interpretations of a statute are possible and one of them would lead to the statute being held unconstitutional, the court should choose the interpretation which would be constitutional. See *Gomez v. United States*, 490 U.S. 858, 864 (1989). A constitutional interpretation of Florida's statutory framework is possible if one reads the provision cited by the court below ("the rental or lease of tangible personal property which is used or stored in this state shall be taxable without regard to its prior use or tax paid on purchase outside the state"), not as cannibalizing the statutory credit provision (as the decision below does) but instead in its proper context, as limiting the scope of Florida's other exemption from use tax (for property purchased outside the state by former nonresidents if the property has been used outside the state for six months or longer before being imported into Florida (§212.06(8)(a), Fla. Stat.)) to purchased property (as opposed to leased property). Because this §212.06(8)(a) exemption exists as a matter of legislative prerogative (unlike the statutory credit provision which exists as a matter of constitutional imperative), there is no constitutional obstacle to limiting

[22] Some justices have expressed the belief that negative Commerce Clause jurisprudence is misguided but have indicated that they will nevertheless enforce it on *stare decisis* grounds against, *inter alia*, a state law that facially discriminates against interstate commerce. See *General Motors. v. Tracy*, 519 U.S. at 312 (Scalia, J., concurring). Since the court below construed the statute in a way that would render the statute facially discriminatory, even those justices who do not subscribe to the internal consistency doctrine should have no trouble finding a Commerce Clause violation here.

the availability of the §212.06(8)(a) exemption to purchased property only. The petitioner, as a lessee, is admittedly not entitled to (and thus never claimed) the §212.06(8)(a) exemption (because leased property is involved); he is, however, entitled to the §212.06(7) credit against the Florida use tax for the New York sales tax previously paid (notwithstanding that leased property is involved).

The decision below affirming the holding that petitioner was not entitled to tax credit against Florida use tax for the New York sales tax previously paid on the entire stream of lease payments is incompatible with this Court's Commerce Clause jurisprudence.

CONCLUSION

For all of the foregoing reasons, petitioner respectfully asks this honorable Court to grant the petition.

Respectfully submitted,

RICHARD D. COHEN
21870 Cartagena Dr.
Boca Raton, Florida 33428
(561) 883-6227
Counsel of Record for Petitioner

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APPENDIX 1

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

RICHARD D. COHEN,

Appellant,

v.

WORLD OMNI FINANCIAL CORP.,

Appellee. /

APPELLATE DIVISION
(CIVIL)
CASE NO.
502003AP.001685XXCCAY

Opinion Filed: Aug. 02, 2004

Appeal from The County Court of the Fifteenth Judicial Circuit Court in and for Palm Beach County, Florida, Judge Susan Lubitz & Judge Joseph Marx.

For Appellant, Richard D. Cohen, Esq., 21870 Cartagena Drive, Boca Raton, FL 33428.

For Appellee, Mitchell Cusid, 7000 West Palmetto Park Road, Boca Raton, FL 33433.

PER CURIAM.

AFFIRMED.

MCCARTHY, CROW, & STERN, JJ., concur.

APPENDIX 2

IN THE COUNTY COURT IN AND FOR PALM BEACH COUNTY, FLORIDA

CIVIL DIVISION

CASE NO. SC 00 124 RD

WORLD OMNI FINANCIAL CORP.,

Plaintiff,

vs.

RICHARD D. COHEN,

Defendant. /

ORDER GRANTING FINAL SUMMARY JUDGMENT

THIS case came before the court for hearing on Plaintiff's Motion For Summary Judgment On Defendant's Counterclaim. Counsel for Plaintiff/Counter Defendant, World Omni Financial Corp. ("World Omni"), and defendant/counter plaintiff, Richard Cohen ("Cohen"), appeared. The court, having considered the pleadings, affidavits, statutes, administrative codes, and other documents in the court record, finds as follows:

FACTS

Cohen's Countrclaim is based upon his allegation that he made the monthly payments under the terms of the Closed End Motor Vehicle Lease Agreement For Land Rover Vehicles ("Lease" Exhibit A, attached to the Complaint) and that World Omni wrongfully repossessed his

vehicle. Count 1, Breach Of The Lease, alleges that Cohen made all payments under the Lease; Count 2, Breach Of The Lease, alleges that Cohen was entitled to a tax refund for a portion of the New York State sales tax that was included in the monthly payments; Count 3, alleges that World Omni committed liable by notifying third parties of the default and repossession.

There is no genuine issue as to any material fact. It is uncontradicted that Cohen failed to pay the entire monthly lease payments when World Omni increased the lease payments to include a 6% sales and use tax imposed by Florida law. World Omni repossessed and sold the vehicle. Cohen alleges either that he was not required to pay the Florida sales and use tax on the Lease or that he was entitled to a refund on a portion of the New York sales tax which was paid at the inception of the lease.

CONCLUSIONS OF LAW

The Lease permits World Omni to change the monthly payments for increases or decreases in taxes (paragraph 26). The State of Florida required World Omni to collect the sales and use tax on the leased vehicle when Cohen moved to Florida. Section 212.06(8)(a), Fla. Stat., states "The rental or lease of tangible personal property which is used or stored in this state shall be taxable without regard to its prior use or tax paid on purchase outside this state."; See also Section 12A-1.000 (14), FAC. Payment of the New York Lease [sic] [sales tax] was due at the inception of the lease on the total amount of the base payments for the entire term of the lease. State-Reg., NY Tax RPTR (Doc. 11); In the matter of Petition on of Jennifer Miehle, State of New York, Division of Tax Appeals, attached to Defendant's

Cross Motion For Summary Judgment Dismissing The Complaint. Cohen has presented no authority to support his claim that he was entitled to a credit for the payment of the New York sales tax which was paid by World Omni and then prorated in his monthly payments.

Based on the foregoing, it is

ORDERED AND ADJUDGED that plaintiff's Motion For Judgment on the Counterclaim is granted.

DONE AND ORDERED in Delray Beach, Palm Beach County, Florida this 11 day of July, 2000.

/s/ Susan Lubitz
SUSAN LUBITZ
COUNTY COURT JUDGE

Copies furnished:

Michael Chusid, Esq.
7000 West Palmetto Park Road, Ste. 400
Boca Raton, Fl 33433

Richard D. Cohen
21870 Cartagena Drive
Boca Raton, Fl 33428

APPENDIX 3

IN THE COUNTY COURT IN
AND FOR PALM BEACH
COUNTY, FLORIDA

CIVIL DIVISION

CASE NO. SC 00 124 RD

WORLD OMNI
FINANCIAL CORP.,

Plaintiff,

vs.

RICHARD D. COHEN,

Defendant. /

ORDER ON PLAINTIFF'S MOTION FOR FINAL SUMMARY JUDGMENT

THIS case came before the court for hearing on Plaintiff's Motion for Final Summary Judgment. Plaintiff's counsel and Defendant Richard D. Cohen appeared.

The court, having considered argument, the record, and previous rulings, it is

ORDERED AND ADJUDGED as follows:

1. Plaintiff's Motion for Final Summary Judgment is granted on the issue of liability, as the court has previously ruled that Defendant Richard D. Cohen defaulted on the loan [sic] [lease] and the vehicle was repossessed in accordance with the contract and the laws of New York and Florida.

2. Plaintiff's Motion for Final Summary Judgment is denied on the issue of standing and damages, as there are genuine issues of disputed material facts.

DONE AND ORDERED in Delray Beach, Palm Beach County, Florida this 9 day of April, 2001.

/s/ Susan Lubitz
SUSAN LUBITZ
COUNTY COURT JUDGE

Copies furnished:

Richard D. Cohen
21870 Cartagena Drive
Boca Raton, Fl 33428

Michael Chusid, Esq.
Ritter Chusid Bivona & Cohen LLP
7000 West Palmetto Park Road, Ste. 400
Boca Raton, Fl 33433

APPENDIX 4

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

APPELLATE DIVISION
(CIVIL)
CASE NO.
502003AP001685XXCCAY

RICHARD D. COHEN,

Appellant,

v.

WORLD OMNI FINANCIAL CORP.,

Appellee. /

BY ORDER OF THE COURT:

THIS CAUSE came before the Court upon Appellant's Motion for Rehearing-Request for Written Opinion. The Court, having reviewed the Motion and the Response, and being advised of the matter, it is

ORDERED and ADJUDGED that Appellant's Motion for Rehearing-Request for Written Opinion is **DENIED.** The Court need not issue a written opinion to explain what is apparent from the record. *Horn v. Marine Hospitality Corporation*, 745 So.2d 329 (Fla. 4th DCA 1998).

DONE: AUG. 31, 2004

cc:

Richard D. Cohen, Esq., 21870 Cartagena Drive, Boca Raton, FL 33428.

Mitchell Chusid, 7000 West Palmetto Park Road, Boca Raton, FL 33433.

APPENDIX 5

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOURTH DISTRICT, P.O. BOX 3315, WEST PALM BEACH, FL 33402

February 15, 2005

CASE NO.: 4D04-3704
L.T. NO.: 2003 AP 001685 AY

RICHARD D. COHEN, v. WORLD OMNI FINANCIAL CORP.,

Appellant/Petitioner(s), Appellee/Respondent(s).

BY ORDER OF THE COURT:

ORDERED that petitioner's February 2, 2005, Motion to Disqualify Judge Melanie G. May is hereby granted; further,

ORDERED that petitioner's motion to stay proceedings pending certiorari review is hereby denied as moot; further,

ORDERED that petitioner's motion for attorney's fees on appeal is hereby denied; further,

ORDERED that respondent's motion for attorney's fees filed November 22, 2004, is granted. On remand the trial court shall set the amount of the attorney's fees to be awarded for this appellate case. If a motion for rehearing is filed in this court, then services rendered in connection therewith, including preparation of a response may be taken into account in computing the amount of the fee; further,

ORDERED that petitioner's request for oral argument is hereby denied; further,

ORDERED that petitioner's emergency motion to expedite is hereby denied as moot; further,

ORDERED that the petition for writ of certiorari is hereby denied. *See Haines City Community Dev. v. Heggs*, 658 So. 2d 523 (Fla. 1995); *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624 (Fla. 1982).

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

Served:

Richard D. Cohen Mitchel Chusid Sharon R. Brock, Clerk

dl [SEAL]

/s/ Marilyn Beuttenmuller
MARILYN BEUTTENMULLER,
Clerk
Fourth District Court of Appeal

APPENDIX 6

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOURTH DISTRICT, P.O. BOX 3315, WEST PALM BEACH, FL 33402

March 29, 2005

CASE NO.: 4D04-3704
L.T. NO.: 2003 AP 001685 AY

RICHARD D. COHEN, v. WORLD OMNI FINANCIAL CORP.,

Appellant/Petitioner(s), Appellee/Respondent(s).

BY ORDER OF THE COURT:

ORDERED that petitioner's motion filed February 24, 2005, for rehearing-request for written opinion is hereby denied; further,

ORDERED that petitioner's first supplement filed March 1, 2005, to petitioner's motion for rehearing-request for written opinion is hereby denied; further,

ORDERED that petitioner's request filed March 7, 2005, in the alternative, for certificate certifying that a federal question was raised and decided is hereby denied; further,

ORDERED that petitioner's request filed March 15, 2005, for permission to reply to respondent's opposition to petitioner's request for a certificate certifying that a federal question was raised and decided is hereby denied.

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

Served:

Richard D. Cohen Mitchel Chusid

cd [SEAL]

/s/ Marilyn Beuttenmuller
MARILYN BEUTTENMULLER,
Clerk
Fourth District Court of Appeal

APPENDIX 7

State of Florida
Department of Revenue

May 15, 1998

Re: Technical Assistance Advisement 98A-037
Sales and use Tax
Lease of Motor Vehicle
Section 212.06(7) & (8), F.S.

Dear [Name(s) Intentionally Omitted in Original]:

This Technical Assistance Advisement is in response to your letter of February 16, 1998, in which you seek advice as to the taxable status of an automobile lease in which you are the lessee. Your letter provides in pertinent part:

> 1. Under a New York Motor Vehicle Lease Agreement dated December 12, 1996 (the lease agreement), I am currently leasing a 1997 Toyota Avalon . . . XXX [the "Lessor"]. . . .
>
> 2. As per the terms of the lease agreement, I paid to the State of New York $1,211.81 (assessed at 8½%) representing "Sales/Use/Excise Taxes". I made this payment concurrent with the signing of the lease agreement.
>
> 3. My wife has been the driver of the leased vehicle since inception of the lease agreement. My wife and 2 sons relocated to the State of Florida during November 1997; this necessitated my garaging (and registration) of the leased vehicle in Florida for her continued use.
>
> 4. I presently work in New York and as the lessee under the lease agreement, I continue to make my monthly lease payments from New York.

5. Commensurate with my garaging and registration of the leased vehicle in Florida [Lessor] has assessed an additional 6% tax on my monthly lease payment representing Florida Sales/Use Tax. [Lessor] states that the additional tax is pursuant to Section 212.06(8)(a), F.S. of the Florida Sales and Use Tax Act.

6. After carefully reviewing applicable sections of the Florida Sales and Use Tax Act, I have concluded that the additional assessment is incorrect and accordingly, I have formally disputed the assessment with the lessor.

You also provided a copy of your lease agreement which shows a lease term of thirty-six (36) months.

DISCUSSION

Section 212.06, F.S., provides in part:

(7) The provisions of this chapter do not apply in respect to the use or consumption of tangible personal property, or distribution or storage of tangible personal property for use or consumption in this state, upon which a like tax equal to or greater than the amount imposed by this chapter has been lawfully imposed and paid in another state, territory of the United States, or the District of Columbia. . . . If the amount of tax paid in another state, territory of the United States, or the District of Columbia is not equal to or greater than the amount of tax imposed by this chapter, then the dealer shall pay to the department an amount sufficient to make the tax paid in the other state, territory of the United States, or the District of Columbia and in this

> state equal to the amount imposed by this chapter.
>
> (8) (a) Use tax will apply and be due on tangible personal property imported or caused to be imported into this state for use, consumption, distribution, or storage to be used or consumed in this state; provided, however, that, . . . , it shall be presumed that tangible personal property used in another state, territory of the United States, or the District of Columbia for 6 months or longer before being imported into this state was not purchased for use in this state. **The rental or lease of tangible personal property which is used or stored in this state shall be taxable without regard to its prior use or tax paid on purchase outside this state.** (emphasis supplied)

Rule 12A-1.007(14), F.A.C., provides in part:

> (a) The rental or lease of an aircraft, boat, mobile home, or motor vehicle, which is used or stored in this state, shall be taxable without regard to its prior use or tax paid on the purchase outside this state.

It is the Department's position that the statute is clear in providing that a lease or rental of tangible personal property used or stored in Florida is taxable irrespective of its prior use or prior taxable status in another state. Therefore, your lessor is correct in charging you tax on your automobile lease.

Although it will not be of assistance, it may be of interest to you that the Florida Legislature in the 1998 legislative session, which ended on May 1, 1998, amended Section 212.06, F.S., to remove from the imposition of sales and use tax certain non-commercial motor vehicles leased in

excess of twelve (12) months. To avoid taxation, the motor vehicle must be used in another state and tax must be paid in the other state. Since your leased vehicle is registered and used in Florida, the lease payments continue to be taxable in Florida.

This response constitutes a Technical Assistance Advisement under s. 213.22, F.S. which is binding on the department only under facts and circumstances described in the request for this advice as specified in s. 213.22, F.S. Our response is predicated on those facts and the specific situation summarized above. You are advised that subsequent statutory or administrative rule changes or judicial interpretations of the statutes or rules upon which this advice is based may subject similar future transactions to a different treatment than expressed in this response.

You are further advised that this response and our request are public records under chapter 119, F.S., which are subject to disclosure to the public under the conditions of s. 213.22, F.S. Your name, address, and any other details which might lead to identification of the taxpayer must be deleted by the Department before disclosure. In an effort to protect the confidentiality of such information, we request you notify the undersigned in writing within 15 days of any deletions you wish made to the request or the response.

Sincerely,

Jonathan E. Swift
Tax Law Specialist
Technical Assistance and Dispute Resolution
(850) 922-4840

Control #33319

NOTICE UNDER THE AMERICANS WITH DISABILITIES ACT

Persons needing an accommodation to participate in any proceeding before the Tax Policy and Dispute Resolution Office, should contact that office at 904-488-0717 (voice), or 1-800-DOR-8331 (TDD), at least five working days before such proceeding. You may also call via the Florida Relay System at 1-800-955-8770 (voice), or 1-800-955-8771 (TDD).

APPENDIX 8

In the Matter of the Petition of SANDRA ANN TORQUATO for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Year 1998

DTA NO. 816973

STATE OF NEW YORK-TAX APPEALS TRIBUNAL

2000 N.Y. Tax LEXIS 283

October 12, 2000

PANEL:

[*1] Donald C. DeWitt, President; Carroll R. Jenkins, Commissioner; Joseph W. Pinto, Jr. Commissioner.

OPINION BY:

PER CURIAM

OPINION:

DECISION

Petitioner Sandra Ann Torquato, 24501 Heavenly Court, West Hills, California 91307, filed an exception to the determination of the Administrative Law Judge issued on March 30, 2000. Petitioner appeared *pro se*. The Division of Taxation appeared by Barbara G. Billet, Esq. (Justine Clarke Caplan, Esq., of counsel).

Neither party filed a brief. Oral argument was not requested.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether the Division of Taxation properly denied petitioner's application for a refund of a portion of the total sales tax paid at the inception of a motor vehicle lease agreement.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

On April 26, 1997, petitioner, Sandra Ann Torquato, entered into a lease agreement with Toyota Motor Credit Corporation for the lease of a 1997 Toyota Corolla. The lease provided for 36 monthly payments of $189.00 for a total lease amount $6,804.00. The lessor collected sales [*2] tax of $685.02 at the inception of the lease based on petitioner's total payment of $8,5359.07.[1]

There is no dispute that petitioner was a resident of New York State at the inception of the lease. Petitioner made eleven lease payments before she relocated to California in February 1998. Thereafter, petitioner's lease payments increased by $15.59 per month. Petitioner inquired and was advised by the lessor that the increase represented California sales tax on each of the remaining 25 lease payments, and that California "would not honor the prepaid state tax already paid to New York."

On March 18, 1998, petitioner filed an Application for Credit or Refund ("Form AU-11") seeking a refund of a

[1] The tax was imposed at the Nassau County rate of 8⅛% on the $6,804.07 total amount of the lease payments ($189.00/month x 36 months) plus petitioner's down payment amount of $1,255.00.

portion of the New York sales tax collected at the inception of the lease. Petitioner calculated the amount of refund claimed by dividing the total sales tax paid ($685.02) by the number of lease payments (36) to arrive at the amount of sales tax per month ($19.03). Petitioner multiplied such amount [*3] ($19.03) by the number of lease payments she made while in New York (11) to arrive at $209.31. Petitioner then subtracted such amount ($209.31) from the total sales tax paid ($685.02) to result in the amount of claimed refund ($475.71). In sum, petitioner takes the position that although the tax was paid at the inception of the lease, her move to California constituted a change of circumstances which should allow her to apportion the tax equally among each of the lease payments, to pay tax only on those payments made while she was living in New York, and to receive a refund of the balance of tax apportioned to those remaining payments made (or to be made) when petitioner was no longer living in New York.

The Division of Taxation ("Division") denied the refund claim by letter dated May 22, 1998 for the following reason:

> When a lease, an option to renew or similar provision, or a combination of these, is entered into on or after June 1, 1990, the amount due under the agreement and for the entire period covered (including renewals and/or options) will be immediately subject to sales tax.
>
> There is no provision in the New York State sales and use tax law to allow for refund [*4] of sales tax paid on the lease of a vehicle where the lessee relocated to another state where they may also be required to pay tax.

Petitioner challenged this denial by requesting a conciliation conference with the Division's Bureau of Conciliation and Mediation Services. Petitioner opted to have the conference decided upon correspondence and, after submission and review of such correspondence, a Conciliation Order (CMS No. 168676) dated January 15, 1999 was issued sustaining the Division's denial of petitioner's refund request.

Petitioner continued her challenge by filing a petition with the Division of Tax Appeals. Petitioner's position remains that she should be entitled to a refund of part of the sales tax paid, calculated as apportioned to the 25 payments on the lease remaining after she moved to California. Petitioner points out that without such a refund she will have paid the total New York sales tax, plus an additional $389.75 in California sales tax (15.59 x 25 payments = $389.75), rather than New York sales tax on only those lease payments made while petitioner was living in New York and the California sales tax thereafter.

The Division continues to oppose petitioner's [*5] refund claim for the reasons set forth in its May 22, 1998 refund denial letter. The Division's letter brief states that the tax was properly collected in the first instance (Tax Law § 1111[i][A]; 20 NYCRR 527.15), and that there is no provision under which such tax, properly imposed and collected, may be refunded under the circumstances presented (Tax Law §§ 1119, 1139). Finally, the Division points out that petitioner may be entitled to a reciprocity credit from the State of California based on the New York taxes already paid (20 NYCRR 527.15[f]), and it has advised her by letter to contact the State of California in this regard.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge noted the provision of Tax Law § 1111(i)(A) which provides that, with respect to the lease of a motor vehicle for a period of one year or more, the sales tax is due at the inception of the lease on the total amount of the lease payments for the entire term of the lease (20 NYCRR 527.15[a]). The Administrative Law Judge also noted that Tax Law § 1139 provides that a credit or refund is allowable for any tax which was erroneously, illegally or unconstitutionally collected [*6] or paid. However, in this case the Administrative Law Judge found that the lessor collected and the lessee paid the proper amount of sales tax on the transaction as required by Tax Law § 1111(i). Since petitioner made no claim nor submitted any evidence to the Administrative Law Judge that the tax was collected or paid erroneously, illegally or unconstitutionally, he found that there was no provision for the relief sought, despite the fact that the vehicle was relocated to another jurisdiction where it was subjected to further taxation.

ARGUMENTS ON EXCEPTION

On exception, petitioner argues that the Administrative Law Judge's Determination was issued in bad faith on the basis that despite the fact that there is no provision in the New York Tax Law for a refund of the sales tax in issue, there is also no provision prohibiting the refund of such sales tax. In addition, petitioner contends that the State of New York is not entitled to retain the sales tax collected.

OPINION

We affirm the determination of the Administrative Law Judge based upon the reasoning set forth in his determination. In addition, since the issuance of the determination in this matter, we have issued [*7] our decision in *Matter of Miehle* (Tax Appeals Tribunal, August 24, 2000) where we came to the same conclusion as the Administrative Law Judge herein.

In *Miehle*, we reviewed the enactment of the law which accelerated the collection of sales tax on certain leases of motor vehicles with a duration of one year or more (Tax Law § 1111[i]) and provided our rationale for concluding that the Legislature was aware of its failure to provide for a refund of said taxes, citing two instances where bills were introduced to provide for a refund in the case of early termination or non-renewal of a motor vehicle lease and the vehicle's destruction. We also noted the refund provision contained in Tax Law § 1139(f), which the Legislature provided for lessees that received a refund of their purchase price under the New York "lemon law" as further evidence that had a refund provision been intended it would have been specifically stated.

Petitioner concedes the absence of a refund provision in the statute, but argues that the statute does not prohibit the refund she requests. However, this is petitioner's interpretation of the statute's silence. The Division's regulation at 20 NYCRR 527.15(e), [*8] which is consistent with the terms of Tax Law § 1111, specifically provides that no refund will be allowed based upon an argument rooted in the theory that part of the lease payments were unused, as petitioner urges, since Tax Law § 1111(i) deems all the receipts to have been paid.

To prevail over the administrative construction, petitioner must establish not only that its interpretation of the law is a plausible one but, also, that its interpretation is the only reasonable construction [cite omitted]. Thus, unless the Department of Taxation and Finance's regulation is shown to be irrational and inconsistent with the statute [cite omitted], it should be upheld (*Matter of Blue Spruce Farms v. New York State Tax Comm.*, 99 AD2d 867, 472 NYS2d 744, 745, *affd* 64 NY2d 682, 485 NYS2d 526).

Since we have concluded the Division's interpretation is reasonable, petitioner's challenge is rejected.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Sandra Ann Torquato is denied;

2. The determination of the Administrative Law Judge is sustained;

3. The petition of Sandra Ann Torquato is denied; and

4. The Division of Taxation's denial of [*9] petitioner's refund application is sustained.

No. 04-1727

FILED
SEP 7 - 2005
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

RICHARD D. COHEN,

Petitioner,

v.

WORLD OMNI FINANCIAL CORP.,

Respondent.

On Petition For Writ Of Certiorari To The Circuit Court Of Florida, Palm Beach County

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ALLISON KAY GRANT, Esq.
Florida Bar No.: 858330
Counsel of Record for Respondent
RITTER, CHUSID, BIVONA & COHEN, LLP
7000 Palmetto Park Road, Suite 305
Boca Raton, Florida 33433
Telephone: (561) 394-2180
Facsimile: (561) 394-2583

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Respondent objects to the Question Presented proffered by Petitioner and offers the following as the correct issues to be considered in this Petition for Writ of Certiorari:

1. Whether the federal question presented by Petitioner was properly raised and decided by the courts below.

2. Whether the decisions below rested on "adequate and independent" state law grounds.

3. Whether the federal question presented by Petitioner raises any matter worthy of review by this Court.

CORPORATE DISCLOSURE STATEMENT

Respondent, World Omni Financial Corp., is a wholly owned subsidiary of JM Family Enterprises, Inc., a privately held corporation.

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STATEMENT OF THE CASE

At the outset, Respondent, World Omni Financial Corp. ("World Omni"), objects to the Statement of Case proffered by Petitioner, Richard D. Cohen ("Cohen"), on the grounds that it contains misstatements of fact and irrelevant material,[1] omits several key facts, and is argumentative. The following are the facts essential to a proper understanding of this case:

This is an action arising out of a thirty-six (36) month Closed-End Vehicle Lease Agreement (the "Lease") for a 1995 Land Rover Discovery (the "Vehicle") between Cohen and a dealer in New York dated May 13, 1995. The Lease was subsequently assigned to World Omni. [App. 4-19]. As required by New York law, sales tax for the entire term of the Lease was paid up-front by the dealer, which was then repaid in monthly installments by Cohen. [App. 28]. *See* N.Y. Tax Law § 1111(i). Although Cohen fails to mention it, New York law does not provide for a sales tax credit or refund under any circumstance. 20 N.Y.C.R.R. § 527.15(e). This fact is the heart of this case.

When Cohen moved from New York to Florida in June of 1996, World Omni, in accordance with Florida law, and as expressly provided by section 26 of the Lease, began charging Cohen for Florida Sales and Use Tax in the amount of six percent (6%), thereby increasing his monthly lease payment by $42.67. [App. 29]. Cohen paid the new monthly lease payments in full for approximately

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[1] Cohen's references to market research and purported U.S. Census Bureau statistics were not part of the record below and have no relevance to this Petition. *See* Cohen's Petition for Writ of Certiorari, pp. 15-18.

fifteen (15) months (i.e., from July of 1996 to September of 1997). In October of 1997, however, Cohen refused to pay the additional 6%, now claiming that he was already paying New York sales tax. [App. 29, 38, 39]. World Omni advised Cohen that under Florida law, it was required to collect the tax and, therefore, Cohen was not entitled to a tax credit or refund for sales tax paid already to the State of New York. Despite the foregoing, Cohen unilaterally decided to "set-off" $643.05 (for the fifteen months he "mistakenly" paid the 6% Florida Sales and Use Tax) and, thereafter, paid only the monthly base payment (i.e., without the 6% Florida Sales and Use Tax). [App. 29-30, 40-43].

In February of 1998, Cohen was involved in an accident in which the Vehicle sustained rear-end collision damage. [App. 30-31]. A few weeks later, the Vehicle experienced a complete mechanical breakdown; it would not start and had to be towed to the dealer. The total estimated mechanical and collision damages were $3,343.28. [App. 89; App. 185-187]. Cohen refused to sign a written authorization to repair the damage to the Vehicle. In fact, up until the time of trial, Cohen argued that he had no obligation to maintain the Vehicle even though sections 12 and 17 of the Lease specifically and expressly required Cohen to keep the Vehicle in good working order and condition. [App. 11]. Based on the foregoing, and coupled with Cohen's failure to make the final two monthly payments due under the Lease,[2] World Omni

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[2] Remarkably, Cohen refused to make the final two payments because the Vehicle was inoperable. In an August 31, 1998 letter to World Omni's prior counsel, Cohen conceded the following: "[i]n February, 1998, the vehicle experienced a complete mechanical breakdown and was towed to the Land Rover dealership in North Dade. *After I was quoted a cost to repair the vehicle which was in excess of $2,000, I determined that it did*

(Continued on following page)

declared Cohen in default and repossessed the Vehicle on February 27, 1998. [App. 2, 37, 38]. As determined by the jury, the Vehicle was then sold in a commercially reasonable manner at public auction.

Upon Cohen's failure to pay the deficiency, on January 4, 2000, World Omni initiated this action in the County Court in the Fifteenth Judicial Circuit in and for Palm Beach County, Florida (the "County Court" or "lower court"). [App. 1-3]. On February 2, 2000, Cohen filed an Answer and Affirmative Defenses, and a Counterclaim against World Omni alleging breach of contract (i.e., World Omni breached the Lease by charging Florida Sales and Use Tax or, in the alternative, by failing to provide Cohen with a refund for the portion of New York sales tax already paid) and libel. [App. 26-36]. Notably, Cohen did not allege that the operative statute (i.e., Fla. Stat. § 212.06(8)(a)) was unconstitutional.

On May 2, 2000, World Omni filed a Motion for Final Summary Judgment on Cohen's Counterclaim. [App. 37-44]. In short, World Omni argued that Fla. Stat. § 212.06(8)(a) required it to charge Cohen for Florida Sales and Use Tax irrespective of the fact that Cohen was also being charged for New York sales tax. Cohen argued at least eight different points in opposition to World Omni's motion, however, for purposes of this Petition, he never argued that Fla. Stat. § 212.06(8)(a) was itself unconstitutional. [App. 45-63]. Instead, in his sixth point, Cohen argued that he was statutorily entitled to a credit under Fla. Stat. § 212.06(7) and absent such a credit, he would be subject to multiple taxation in violation of the

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not make business sense for me to proceed with the repairs at my expense given that there were only 3 months remaining under the lease . . ." (Emphasis added). [App. 185-187].

Commerce Clause. Curiously, Cohen went on to advise the lower court that it "*need not reach the statutory and constitutional issues in order to determine the case.*" (Emphasis added). [App. 59]. The lower court apparently agreed and did not reach the federal question when it granted World Omni's Motion for Summary Judgment on Cohen's Counterclaim by Order dated July 11, 2000. [App. 64-66]. Clearly, there was no need for the lower court to consider the federal question as: (1) Cohen's failure to repair the Vehicle and pay the final two payments under the Lease were independent bases for the default; and (2) Fla. Stat. § 212.06(8)(a) required "World Omni to collect the sales and use tax on the leased vehicle when Cohen moved to Florida." [App. 64-66]. Accordingly, the lower court held that Cohen was not entitled to a credit for the payment of the New York sales tax.

Subsequently, on July 17, 2000, Cohen belatedly moved to amend his Answer to include the affirmative defense that World Omni's attempt to collect Florida Sales and Use Tax on lease payments which were already subject to sales tax by the State of New York "violates limitations on State taxation imposed by the Commerce Clause of the United States Constitution." [App. 67-69]. Cohen's motion to amend was denied. [App. 84-85]. Accordingly, this issue, which is the gravamen of Cohen's Petition, was never pled or properly raised below.

On March 2, 2001, World Omni filed a Motion for Final Summary Judgment on the issue of liability. [R. 342-382]. Once again, Cohen never argued that the operative statute was unconstitutional. In fact, Cohen did not mention the Commerce Clause in his opposition papers. On April 9, 2001, the lower court granted World Omni's motion "as the court has previously ruled that Defendant Richard D. Cohen defaulted on the loan and the vehicle

was repossessed in accordance with the contract and the laws of New York and Florida." [App. 86-87].

The case went to trial and on March 13, 2003, the jury entered a verdict in favor of World Omni. [R. 3033]. Thereafter, the lower court awarded World Omni attorney's fees and costs.[3] [R. 3147, 3148] [R. 3326-27]. On August 19, 2003, Cohen appealed the July 11, 2000 Order granting World Omni's Motion for Summary Judgment on Cohen's Counterclaim, as well as the Final Judgment.[4] [App. 97-102]. In short, Cohen argued that the lower court erred in finding that he defaulted under the Lease because (1) he was entitled to a credit under Fla. Stat. § 212.06(7); and (2) Fla. Stat. § 212.06(8)(a) was inapplicable because Cohen did not apply for an exemption. Cohen went on to argue, not that the operative statute was unconstitutional, but rather that the lower court's construction of the statute violated the Commerce Clause since "there is a Constitutional obligation to grant a credit for Sales/Use taxes paid to other states." [App. 116].

On August 2, 2004, the Circuit Court, sitting in its appellate capacity, affirmed by *per curiam* opinion the lower court's Order granting World Omni's Motion for Final Summary Judgment on Cohen's Counterclaim, as well as the Final Judgment. [App. 134]. On August 9, 2004, Cohen filed a Motion for Rehearing and Request For a Written Opinion. [App. 135-137]. Both motions were denied.

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[3] Notably, Cohen currently has two separate appeals and two Writs of Prohibition pending in the state courts which relate to the attorneys' fees and costs award.

[4] The April 9, 2001 Order granting World Omni's Motion for Final Summary Judgment on liability was not appealed. [App. 86-87].

On September 29, 2004, Cohen filed a Petition for Writ of Certiorari in the Florida Fourth District Court of Appeal arguing that the Circuit Court, sitting in its appellate capacity, departed from the essential requirements of law in failing to apply settled precedents and in affirming the County Court's decision, which Cohen contended was based upon an inapplicable statute (i.e., Fla. Stat. § 212.06(8)(a)). [App. 138-160]. Once again, Cohen argued not that the operative statute was unconstitutional, but that the courts' construction of the statute was erroneous.

On February 15, 2005, the Fourth District Court of Appeal denied Cohen's Petition for Writ of Certiorari without opinion. [App. 161-162]. Cohen then filed a Motion for Rehearing seeking yet a third review of the decisions below. Cohen also filed a Request Certifying that a Federal Question had been raised and decided for the purpose of establishing entitlement to certiorari review by the United States Supreme Court. [App. 163-165]. The Fourth District Court of Appeals denied both motions. [App. 166-167]. Cohen has now petitioned this Court for the issuance of a writ of certiorari.

REASONS FOR DENYING THE PETITION

This Court should deny the Petition for Writ of Certiorari for the following reasons: (1) the issue presented by Petitioner was not properly raised and decided by the courts below; (2) the decisions below rested on adequate and independent state grounds; and (3) there are no issues worthy of this Court's review. As to the last point, there is no division of authority among the appellate courts, nor is

there any other justification for review. Furthermore, the courts below clearly followed established precedent and reached the correct result.

A. THE ISSUE PRESENTED IN THIS PETITION WAS NOT PROPERLY RAISED OR DECIDED BY THE COURTS BELOW

It is axiomatic that with "very rare exceptions", the United States Supreme Court will not review a state court decision unless a federal question has been raised and decided by the state court. 28 U.S.C. § 1257. *See Adams v. Robertson*, 520 U.S. 83, 86 (1997). Where it is unclear whether a state court has ruled on a federal issue, the Supreme Court will assume that the federal question was not decided and will deny the writ of certiorari unless the petitioner can demonstrate that the federal question was indeed presented to the state court and ruled upon. *See Board of Dir. of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 549-550 (1987). In other words, the Supreme Court will attribute the state court's decision to an interpretation of state law, unless another reasonable basis is apparent. Here, the record reveals that the decisions below were based on independent and adequate state grounds, and not on federal law.

The question presented by Cohen in this Petition is whether Florida's refusal to grant a tax credit for sales tax previously paid on the entire stream of lease payments to the State of New York violates the dormant Commerce Clause. Cohen argues that Fla. Stat. § 212.06(7) and (8)(a) must be construed in a way which would save the statute's constitutionality. To do so, Cohen argues that he must be provided with a credit for sale taxes previously paid to New York on the leased vehicle. *See* Cohen's Petition for

Writ of Certiorari, p. 22. In framing the issue as such, it is unclear whether Cohen now contends that the operative statute is itself unconstitutional or whether he simply contends that the courts below erred in interpreting the statute because their rulings necessarily subject Cohen to cumulative and discriminatory sales and use tax in violation the Commerce Clause. Irrespective, Cohen's Petition either presents a question that was not properly raised and considered below, or one which is not reviewable by this Court.

In Cohen's Answer and Affirmative Defenses [App. 26-36], he alleged, among other things, that World Omni breached the Lease by charging Florida Sales and Use Tax or, in the alternative, by failing to provide Cohen with a refund for the portion of New York sales tax already paid. For purposes of this Petition, this allegation does not challenge the constitutionality of the statute.[5] [App. 2].

In response to World Omni's Motion for Final Summary Judgment on Cohen's Counterclaim [App. 45-63],

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[5] Had Cohen wished to challenge the constitutionality of the operative statute, as a matter of law, he should have filed an action against the Department of Revenue or filed a petition under the applicable provisions of Chapter 120, Florida Statutes. *See Department of Revenue v. Kuhnlein*, 646 So. 2d 717 (Fla. 1994) (Florida residents brought an action against the Department of Revenue challenging the constitutionality of impact fees which were imposed on cars purchased or titled in other states but subsequently registered in-state); *Sharper Image Corp. v. Department of Revenue of State*, 704 So. 2d 657 (Fla. 1st DCA 1997) (retailer filed suit against Department of Revenue challenging the assessment of use tax pursuant to Fla. Stat. § 212.06 on its distribution of catalogs in Florida); *see also, Barringer v. Griffes*, 1 F. 3d 1331 (2d Cir. 1993) (plaintiff filed suit against the Vermont Motor Vehicle Commissioner on the ground that Vermont's failure to grant a tax credit violated the commerce clause). Notably, the Supreme Court denied plaintiff's petition for writ of certiorari. *Griffes v. Barringer*, 510 U.S. 1072 (1994).

Cohen did not challenge the constitutionality of the operative statute, but instead argued that the exemption contained in Fla. Stat. § 212.06(8)(a) was inapplicable to the facts of this case and that the statutory construction proposed by World Omni would subject him to cumulative and discriminatory sales and use tax in violation of the Commerce Clause. Curiously, Cohen went on to advise the lower court that it *"need not reach the statutory and constitutional issues in order to determine the case."* [App. 59]. Indeed, the lower court did not reach the federal question when it granted World Omni's Motion for Summary Judgment on Cohen's Counterclaim. There was no need to consider the issue as: (1) there were independent bases for summary judgment based on Cohen's failure to repair the Vehicle and make the final two monthly lease payments; and (2) Fla. Stat. § 212.06(8)(a) clearly "required World Omni to collect the sales and use tax on the leased vehicle when Cohen moved to Florida . . . [Accordingly, Cohen was not] entitled to a credit for the payment of the New York sales tax . . . " [App. 65].

On appeal, Cohen argued that the lower court erred in interpreting the statute. Specifically, Cohen argued that the lower court's finding that he was not entitled to a credit against the Florida Sales and Use Tax was necessarily erroneous because it resulted in a statutory interpretation which violated the Commerce Clause. Cohen concedes that the Circuit Court never considered the federal question presented in this Petition when it affirmed the lower court's decision.

On September 29, 2004, Cohen filed a Petition for Writ of Certiorari to the Fourth District Court of Appeal. [App. 138-160]. Once again, Cohen argued that the County and Circuit Courts' construction of the statute was erroneous (i.e., they misapplied the law and failed to follow

binding precedents), which resulted in the discriminatory treatment of out-of-state leases in violation of the Commerce Clause. [App. 147-148, 151]. A court's erroneous application of a statute undeniably does not violate the Constitution. *See Hohn v. U.S.*, 524 U.S. 236 (1998). Accordingly, the Fourth District Court of Appeal denied Cohen's Petition for Writ of Certiorari. [App. 161-162]. While no opinion was published, it is clear that the Fourth District never considered the federal question presented herein. Furthermore, the Fourth District denied Cohen's motion for a certificate that a federal question was raised and decided. [App. 163-165, 166-167].

In order to grant certiorari review, the constitutionality of a state statute must be presented and decided by the state court; it is legally insufficient to merely attack the tax levied or to show that the imposition of the tax was considered. *See Wilson v. Cook*, 327 U.S. 474 (1946). "The purpose of this requirement is to make certain that no judgment of a state court will be reviewed on appeal by this Court unless the highest court of the state has first been apprised that the state statute is being assailed as invalid on federal grounds." *Id.* at 479. "This jurisdictional requirement is satisfied only if the record shows that the question of the validity under federal law of the state statute, as construed and applied, has either been presented for decision to the highest court of the state or has in fact been decided by it, and that its decision was necessary to the judgment." *Id.* (citations omitted). It cannot reasonably be disputed that the record in this case fails to reveal that the federal question was presented and decided upon by any of the courts below.[6]

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[6] Even if the federal question had been properly raised and decided, Cohen's Petition seeks mere error correction. It is well

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World Omni respectfully submits that there is nothing about this case that would justify a departure from this Court's practice of requiring that a federal issue be raised and ruled upon before reviewing a state court judgment. To this point, in "cases coming here from state courts in which a state statute is assailed as unconstitutional, there are reasons of peculiar force which should lead us to refrain from deciding questions not presented or decided in the highest court of the state whose judicial action we are called upon to review . . . Apart from the reluctance with which every court should proceed to set aside legislation as unconstitutional on grounds not properly presented, due regard for the appropriate relationship of this Court to state courts requires us to decline to consider and decide questions affecting the validity of state statutes not urged or considered there." *McGoldrick v. Compagnie Generale*, 309 U.S. 430, 435-436 (1940). *See also*, *Miami-Dade County v. Omnipoint Holdings, Inc.*, 863 So. 2d 195, 199 (Fla. 2003) ("a petition seeking certiorari review is not the proper procedural vehicle to challenge the constitutionality of a statute. . . ." Such challenge must be determined in original proceedings). It is for these reasons that this Court has consistently refused to consider any grounds of attack not raised or decided in the state court. *See Howell v. Mississippi*, 125 S.Ct. 856 (2005) (claim not presented in the lower court may not be raised for the first time in the Supreme Court). Based on the foregoing, World

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established that certiorari is not the appropriate mechanism for correcting perceived errors by the lower court. *See Rogers v. Missouri P.R. Co.*, 352 U.S. 500, 531 (1957) (Frankfurter, J. dissenting); *Ivey v. Allstate Ins. Co.*, 774 So. 2d 679, 682 (Fla. 2000); *see also*, Supreme Court Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

Omni submits that the Petition for Writ of Certiorari should be denied.

B. THE DECISIONS BELOW WERE DECIDED ON ADEQUATE AND INDEPENDENT STATE GROUNDS AND, THEREFORE, ARE NOT SUBJECT TO THIS COURT'S REVIEW.

The Supreme Court has long adhered to the principle that "it will not review judgments of state courts that rest on adequate and independent state grounds." *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945); *see also Coleman v. Thompson*, 501 U.S. 722, 729 (1991) ("in the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional"). In other words, the Supreme Court will not review a state court decision if state grounds are sufficient to sustain the judgment. *See Lynch v. People of New York*, 293 U.S. 52 (1934); *Lambrix v. Singletary*, 520 U.S. 518, 522-523 (1997). "[T]he duty of this Court is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." *Local No. 8-6, Oil, Chem. & Atomic Workers Int'l Union v. Missouri*, 361 U.S. 363, 367 (1960) (citations omitted). As explained by the Court in *Pitcairn*, "[the Supreme Court's] only power over state judgments is to correct them to the extent that they *incorrectly adjudge* federal rights." *Id.*, 324 U.S. at 125-126 (emphasis added). "A decision made according to the form of the law and the rules prescribed for rendering it, although it may be erroneous in its conclusion as applied to the facts, is not an illegal or irregular act or proceeding remedial by certiorari." *Ivey v.*

Allstate Ins. Co., 774 So. 2d 679, 682 (Fla. 2000). *See also*, *Watt v. Alaska*, 451 U.S. 259, 265, n.5 (1981) ("certiorari jurisdiction is designed to serve purposes broader than the correction of errors in particular cases").

As discussed above, the federal question raised in this Petition was not considered by the courts below because it was not properly raised, and even if it had been properly raised, there were independent and adequate state grounds to support the lower court's decisions, thus making consideration of the federal question presented herein unnecessary. The record confirms that Cohen defaulted under the Lease based on three independent bases; (1) his failure to pay the Florida Sales and Use Tax;[7] (2) his failure make the final two (2) monthly payments under section 12(a) of the Lease. [R. 2817-2821]; and (3) based on his destruction of the Vehicle and failure to authorize mechanical and collision repairs as required by sections 12 and 17 of the Lease. [App. 4-19]. Remarkably, up until he testified at trial, Cohen steadfastly maintained that he had no obligation to return the Vehicle in working order. Thus, regardless of whether Cohen defaulted under the Lease based on his failure to pay the additional Florida Sales and Use Tax,[8] there were at least two other independent and

[7] Pursuant to Section 26 of the Lease, Cohen had a contractual obligation to pay "all excise, use, personal property, gross receipts and other taxes incurred during the term of the Lease . . . The taxes you must pay will be included in the Amount Due when Lease is Signed (see Paragraph 1) or your Monthly Payment (see Paragraph 3) or separately billed to you by Lessor. *Lessor may change your Monthly Payment for increases and decreases in taxes.* (Emphasis added). [App. 15].

[8] Even assuming that Cohen's failure to pay the Florida Sales and Use Tax was the sole ground for default, certiorari review is not warranted here because this finding did not involve a determination of

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adequate state grounds to support the lower court's decisions. *See Firestone v. Firestone*, 263 So. 2d 223, 225 (Fla. 1972) (final judgment may be affirmed on appeal if the record as a whole discloses any ground upon which the Order can be supported).

In sum, the Supreme Court should not grant certiorari to review decisions of a state court where the basis of a state court's decision makes consideration of the federal question unnecessary. In the case at bar, if this Court were to entertain the question presented herein, it would be rendering a ruling without any effectual relief as there were independent and adequate state grounds to support the decisions below. This is particularly true in light of the fact that the operative statute has since been amended to provide a credit where a taxpayer can document the use of his/her vehicle outside the State of Florida and that a sales tax is being paid in another state. *See* Fla. Stat. § 212.05(1)(c)2. *See also*, TAA 00A-060. (Fla. Dept. Rev. October 26, 2000). Accordingly, the question presented by Cohen in this Petition will have no impact beyond this dispute and, therefore, certiorari review should be denied.

C. THE COURTS BELOW CORRECTLY INTERPRETED AND APPLIED FLA. STAT. § 212.06.

Even if it were appropriate for this Court to take the extraordinary step of granting certiorari to review a claim of error in the application of settled law, simply stated, Cohen's claims of error are wrong. Cohen contends that he had no obligation to pay Florida Sales and Use Tax under

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federal law. Accordingly, review of this finding would not decide the issue raised in this Petition.

Fla. Stat. § 212.06(7) because he was already paying the sales tax to the State of New York.[9] In pertinent part, Fla. Stat. § 212.06 provides as follows:

> (7) The provisions of this chapter do not apply in respect to the use or consumption of tangible personal property or services, or distribution or storage of tangible personal property for use or consumption in this state, upon which a like tax equal to or greater than the amount imposed by this chapter has been lawfully imposed and paid in another state, territory of the United States, or the District of Columbia . . . If the amount of tax paid in another state, territory of the United States, or the District of Columbia is not equal to or greater than the amount of tax imposed by this chapter, then the dealer shall pay to the department an amount sufficient to make the tax paid in the other state, territory of the United States, or the District

[9] Curiously, it does not appear that Cohen has ever challenged New York's tax scheme, which imposes an up-front sales tax on multi-year leases of vehicles, but does not permit a refund of sales tax paid even where the lessor changes his/her residence. *See* N.Y. Tax Law § 1111(i); *see also In Matter of the Petition of Thomas Gallagher*, 2003 WL 22466172 (N.Y. Tax App. Trib., DTA No. 819115, October 23, 2003) (lessor was not entitled to a credit or refund of sales tax paid at the inception of the lease when he moved to New Jersey and was also required to pay New Jersey sales tax for the remaining thirty (30) months on the lease) [App. 179-184]; *Moerdler v. Tax Appeals Tribunal of State of New York*, 298 A.D. 2d 778, 750 N.Y.S.2d 329 (N.Y. A.D. 2002) (the New York State Tax Appeals Tribunal affirmed the decision of the Division of Tax Appeals and held that a taxpayer was not entitled to a refund for sales tax that was paid in full when the lease was terminated after three months because the vehicle was stolen).

> of Columbia and this state equal to the amount imposed by this chapter.
>
> (8)(a) Use tax will apply and be due on tangible personal property imported or caused to be imported into this state for use, consumption, distribution, or storage to be used or consumed in this state; provided, however, that, . . . it shall be presumed that tangible personal property used in another state, territory of the United States, or the District of Columbia for 6 months or longer before being imported into this state was not purchased for use in this state. *The rental or lease of tangible personal property which is used or stored in this state shall be taxable without regard to its prior use or tax paid on purchases outside this state.* (Emphasis added)

Similarly, Fla. Admin. Code R. 12A-1.7(14) provides as follows:

> (a) The rental or lease of an aircraft, boat, mobile home, or motor vehicle, which is used or stored in this state, shall be taxable without regard to its prior use or tax paid on the purchase outside this state.

Without any legal support, Cohen argues that the courts below should have disregarded Fla. Stat. § 212.06(8)(a) because he never requested an exemption. Cohen further argues that § 212.06(8)(a) cannot be read in conjunction with § 212.06(7) because it would produce an inconsistent result. Cohen's construction is illogical and is unsupported by any legal authority. In fact, Cohen's construction was rejected by the Florida Department of Revenue in its Technical Assistance Advisements ("TAA"). *See* TAA 2001A-063,

2001 WL 1358013 (Fla. Dept. Rev. Oct. 4, 2001). [App. 168-178]. Unbeknownst to World Omni or the lower court, on August 29, 2001, Cohen requested a TAA on this very issue.[10] In response to Cohen's Request, the Department of Revenue held that indeed sections 212.06(7) and (8)(a) must be read together; the "credits set forth in these subsections extend to certain transactions, but not to the rental and lease of tangible personal property which is used or stored in this state." *Id.* at *5. The Department of Revenue went on to hold that World Omni correctly applied Florida sales tax to Cohen's montnly lease payments irrespective of the fact that Cohen previously paid sales tax to New York. *Id.*[11] Likewise, the courts below correctly held that Cohen had a statutory obligation to pay Florida Sales and Use Tax.

CONCLUSION

Review of a writ of certiorari is not a right, but a matter of discretion that will only be granted under exceptional circumstances. Here, Cohen has offered no compelling reason for this Court to exercise its discretionary power, there is no conflict between the appellate courts

[10] As Cohen is a lawyer admitted to the Florida Bar in 1987, his failure to disclose this TAA may well violate Rule 4-3.3(a)(3) of the Rules Regulating the Florida Bar.

[11] The Department of Revenue also noted that when the dealer in New York remitted the sales tax for Cohen at the inception of the lease, it was to be reimbursed by Cohen over the next thirty-six (36) months. The invoices from June 1995 to June 1996, however, do not indicate an amount for sales tax even though a separate column for sales/use tax was present. This caused the monies paid for reimbursement to lose their identity as sales tax and, therefore, the entire amount of the lease payment became subject to Florida Sales and Use Tax. *Id.* at *5. [App. 179-184].

presented, and the courts below correctly applied existing law. For the foregoing reasons, Cohen's request for a Writ of Certiorari does not demonstrate the requisite exceptional circumstances and should be denied.

RESPONDENT'S REQUEST FOR ATTORNEYS' FEES AND COSTS AS DAMAGES

Pursuant to Rule 42(2) of the Supreme Court Rules when a petition for writ of certiorari is frivolous, the Court may award the respondent damages and single or double costs under Rule 43. In determining whether an appeal is frivolous, the standard is one of objective reasonableness under the circumstances. While Petitioner, Richard D. Cohen ("Cohen"), signs pleadings indicating that he is representing himself "Pro Se", Cohen is actually an experienced attorney who has been a Member of the Florida Bar since 1987. Incredulously, early in this case Cohen advised the lower court that he was "just a lay consumer who entered into a lease . . . [and that he] should not have to deal with a 'patchwork quilt' of conflicting and/or inconsistent State Sales Tax Law" [App. 4]. Clearly, Cohen should be held to the same objective standard as counsel representing a third party. *See Segarra v. Messina*, 153 F.R.D. 22, 29 (N.D.N.Y. 1994); *see also, Wesley v. Don Stein Buick, Inc.*, 184 F.R.D. 376 (D. Kan. 1998) (Rule 11 sanctions were appropriate against an attorney appearing pro se, where he advanced frivolous claim).

Cohen's Petition for Writ of Certiorari is patently frivolous as he misstates the facts, omits certain key facts, and advances arguments without any legitimate basis in law. Indeed, almost every pleading and motion filed by Cohen in the lower court evidences unreasonable and

vexatious conduct. Not surprisingly, Cohen has a long history of unsuccessful appeals in this case, including three separate appeals and a Petition for Writ of Certiorari to the Fourth District Court of Appeal.[12]

Based on the foregoing, World Omni requests that the Petition be denied and further, that the Court award World Omni its reasonable attorney's fees and costs, and such further relief as is just and proper.

Respectfully submitted,

ALLISON KAY GRANT, Esq.
Florida Bar No.: 858330
Counsel of Record for Respondent
RITTER, CHUSID, BIVONA & COHEN, LLP
7000 Palmetto Park Road, Suite 305
Boca Raton, Florida 33433
Telephone: (561) 394-2180
Facsimile: (561) 394-2583

[12] As mentioned above, Cohen has also filed two separate appeals and two Writs of Prohibition regarding the award of attorney's fees and costs to World Omni.

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WORLD OMNI FINANCIAL CORP.,

PLAINTIFF,

vs

RICHARD D. COHEN,

DEFENDANT, /

IN THE COUNTY COURT, IN AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO. SC.00-124.RD

FLORIDA BAR #161836

COMPLAINT

(Filed Jan. 4, 2000)

COMES NOW the Plaintiff, World Omni Financial Corp., by and through its undersigned counsel and sues the Defendant(s), Richard D. Cohen, and states:

1. That this is an action in excess of $ 5,000.00 and less than $ 15,000.00 and is within the jurisdictional limits of this Court.

2. That the Plaintiff is a corporation authorized to do business within the State of Florida with offices in Broward County, Florida.

3. That this lease was assigned to World Omni Financial Corp

4. That the Defendant(s) is(are) a resident of Palm Beach County, Florida.

5. That payment was to be made in Broward County, Florida

6. This communication, from a debt collector, is an attempt to collect a debt and any information obtained will be used for that purpose.

7. That the Defendant(s) leased a certain 1995 Land Rover Discovery with Identification number SALJY1241SA151437 pursuant to a certain Vehicle Lease Agreement Contract dated 5/13/95 a copy of which is attached hereto as Plaintiff's Exhibit "A".

8. That the Defendant(s) has(have) defaulted by failing to pay the monthly sum due under Plaintiff's Exhibit "A" under the terms of the Vehicle Lease Agreement beginning 1/13/98 and Plaintiff has elected to accelerate payments of the balance, and there remains unpaid the sum of $ 11,980.10 together with interest since date of default.

9. That the subject vehicle was repossessed on 3/5/98 and sold on 4/10/98 in a commercially reasonable manner to the highest bidder, notice having been provided in accordance with Plaintiff's attached Exhibit "B", leaving a balance due Plaintiff from Defendant(s) in the sum of $ 11,980.10 as evidenced by Plaintiff's Exhibit "C".

10. Demand has been made upon Defendant(s) and Plaintiff has fulfilled all conditions precedent to the bringing of this action.

11. That Plaintiff should be awarded attorney's fees pursuant to the Vehicle Lease Agreement necessitated by the filing of this action as included in the "Default Clause."

WHEREFORE, Plaintiff demands Judgment in the sum of $ 11,980.10 together with interest, costs and attorneys fees.

/s/ Dennis B. Freeman
DENNIS B. FREEMAN, P.A.
Aventura Corporate Center
20801 Biscayne Boulevard, Suite #304
Aventura, Florida 33180
(305) 682-8500

01120320 0117.3011

THIS LEASE HAS BEEN ASSIGNED TO BANK OF AMERICA ILLINOIS, AS COLLATERAL AGENT PURSUANT TO A PLEDGE AND SECURITY AGREEMENT DATED AS OF MAY 1, 1995

WORLD OMNI

World Omni Financial Corp.
CLOSED-END MOTOR VEHICLE LEASE AGREEMENT FOR LAND ROVER VEHICLES

LAND ROVER

LESSEE (and CO-LESSEE, if any) Name and Address (include County and Zip Code)	LESSOR: (Dealer Name and Address)
RICHARD D. COHEN 12 POND VIEW CT JERICHO, NY 11753 NASSAU	LAZARUS FRERES & CO. INC. D/B/A RANGE RO 350 GLEN HEAD RD. GLEN HEAD, NY 11545

This is an agreement to lease (the "Lease") the vehicle described below ("Vehicle"). By signing this Lease you agree to all terms and conditions on the front and b of this Lease. **Be sure to read the entire Lease before you sign.**
This is a lease and not a purchase agreement. **Lessor** owns the Vehicle throughout the term of the Lease.
Dealer is assigning this Lease and Vehicle to WORLD OMNI FINANCIAL CORP. ("Assignee"), and you agree to this assignm In this Lease, "you" and "your" refers to any person signing this Lease as Lessee or Co-Lessee. "Lessor", "we", "us" and "our" refer to Dealer and any Assignee. T consumer lease disclosures included in this Lease are made on behalf of Dealer, Assignee and (if Assignee is not World Omni Financial Corp. ("WOFC")) are a made on behalf of WOFC, who will administer the Lease. For purposes of the Federal Consumer Leasing Act only, WOFC should also be considered a Lessor.
The address for Assignee and WOFC is 120 N.W. 12th Avenue, Deerfield Beach, FL 33442.

App. 4

New or Used	Year	Make & Model	Body Type	Vehicle Identification Number	Primary Use	Mileage on Odometer
NEW	95	LA/RO DISCOVERY	4DSD	SALJY1241SA151437	☒ Personal, Family or Household ☐ Business or Agricultural	

Including: ☐ Automatic Trans. ☐ Air Cond. ☐ Stereo Tape ☐ Cruise Control ☐ Power Windows ☐ Power Seats ☐ ABS ☐ Tilt Wheel
☐ Service Contract ☐ Extended Warranty Other Equipment:

1. AMOUNT DUE WHEN LEASE IS SIGNED $ 1610.20

2. NUMBER OF MONTHLY PAYMENTS 36

These amounts make up the Amount Due When Lease Is Signed:

a.	Capitalized Cost Reduction	$ N/A
b.	Net Trade-in Allowance (not less than $0) Yr/Make/Model	$ N/A
c.	First Monthly Payment in Advance	$ 711.20
d.	Refundable Security Deposit	$ 750.00
e.	Title, License and Registration Fees + DOC	$ 149.00
f.	Sales/Lease/Excise/Use/Ad Valorem Tax (if required to be paid in advance)	$ N/A
g.	Other	$ N/A
h.	Other	$ N/A

3. MONTHLY PAYMENT $ 711.20

4. TOTAL OF MONTHLY PAYMENTS $ 25603.20

These amounts make up the Monthly Payment:

a.	Base Monthly Payment	$ 711.20
b.	Sales/Use/Lease/Other Tax*	$ N/A
c.	Other	$ N/A
d.	Other	$ N/A

* Estimated based on current tax rate.

The Base Monthly Payment includes both depreciation and lease charges. The Total Lease Charge for the entire term of the Lease is: $ 7070.40 This value is used in Paragraphs 11 and 16.

5. PAYMENT SCHEDULE
Your first Monthly Payment is due when you sign this Lease.
Your other 35 Monthly Payments are due on the 13TH day of each month, beginning JUNE 95

6. TOTAL ESTIMATED FEES AND TAXES PAYABLE DURING LEASE:
$ 2304.25
These amounts make up the total:

a.	Title, License and Registration Fees (both initial and renewal)	$ 149.00
b.	Ad Valorem Taxes	$ N/A
c.	Sales/Lease/Use/Other Taxes	$ 2155.25
d.	Other	$ N/A

7. LATE PAYMENT FEE: If any payment is not made in full within 10 days afte it is due, you will owe a late charge of 5% of the part of the payment that is late

8. ESTIMATED RESIDUAL VALUE OF VEHICLE at scheduled Lease end.
21517.42 This value is used in Paragraphs 11 and 16.

9a. EXCESS MILEAGE CHARGE: Mileage in excess of 36000 mile for the lease term ("Contract Mileage Allowance") is considered excessive (If n mileage figure is inserted in the preceding blank, your Contract Mileage Allowanc shall be 1,250 miles per month for each month of the lease term (see Paragrap 2)), and unless you purchase the Vehicle (see Paragraph 16), you agree to pa us at the scheduled termination of the Lease $.12 per mile for each mile drive in excess of the Contract Mileage Allowance.

9.b REFUND OF UNUSED MILEAGE ALLOWANCE FOR LEASES OF 36 MONTHS OR LESS: The Standard Mileage Allowance for a lease with a term of **36** months or less is **1,250** miles per month for each month of the lease term (see Paragraph 2). If the Contract Mileage Allowance (see Paragraph 9a exceeds the Standard Mileage Allowance, you may be eligible for a refund on the portion of the unused Contract Mileage Allowance which exceeds the Standard Mileage Allowance. The refund will be made at the scheduled termination of this Lease in the amount of **$.12** for each unused mile that the Contract Mileage Allowance exceeds the Standard Mileage Allowance, less any amounts you owe under this Lease. No refund will be made for any unused Standard Mileage Allowance. In addition, no refund will be made if: (i) your scheduled lease term is more than **36** months; (ii) you exercise any purchase option; (iii) you voluntarily early terminate or are in default; or (iv) the refund amount is less than **$1.00**.

10. INSURANCE

Public Liability and Physical Damage Insurance; Prior to delivery of the Vehicle, you must purchase Public Liability and Physical Damage Insurance on the Vehicle that covers both you and us. The coverage must be not less than **$100,000/$300,000** bodily injury, **$50,000** property damage and physical damage coverage with deductibles not to exceed **$500** for collision and **$500** for comprehensive. Named Driver Exclusions or other Named Driver or other non-standard limiting endorsements are **NOT** acceptable. **NO OTHER TYPES OF INSURANCE ARE REQUIRED BY US.**

Assignee must be named as "additional insured" and "loss payee" on your insurance policy. Each policy must provide that Assignee will be notified in writing at least **10** days before the insurance is cancelled or coverage altered and that Assignee or its representative may have full access to your insurer's claim file in the event of an insurable loss. You have the option of furnishing the required amount of insurance either (i) through any existing policies owned or controlled by you and issued by a carrier reasonably acceptable to us, or (ii) by purchasing the required coverage separately through any insurer reasonably acceptable to us. We will credit you with the proceeds of any insurance that we receive for any loss. If the proceeds of any insurance are not sufficient to pay the amounts due under Paragraph 13 of this Lease, you agree to pay the remaining balance due.

11. VOLUNTARY EARLY TERMINATION. Provided you are not in default (see Paragraph 12), then, upon **15** days prior notice, you may terminate this Lease on the due date of any Monthly Payment. If you do so, and if you do not exercise your purchase option at that time (see Paragraph 16), you will owe us an amount (the "Early Termination Charge") determined by **ADDING** (a) the Base Monthly Payment (see Paragraph 3 (a)) times the number of monthly payments not yet made, **PLUS** (b) the "Estimated Residual Value of Vehicle" (see Paragraph 8), **PLUS** (c) a Disposition Fee of **$250**, **MINUS** (d) the "Realized Value" (as specified below) of the Vehicle, **MINUS** (e) the unearned lease charge calculated in accordance with an Actuarial Method. Under this method of determining the unearned lease charge, the monthly lease charges (including those for the month in which the early termination occurs) are earned in advance on the scheduled due dates

of your Monthly Payments and your Monthly Payments are deemed to have been received on their scheduled due dates (see Paragraph 3 for Total Lease Charge).

The "Realized Value" of the Vehicle is the price we receive at the time of disposition of the Vehicle minus the reasonable costs of preparation and sale of the Vehicle. For this purpose, we shall sell the Vehicle at wholesale or otherwise determine its wholesale value in a commercially reasonable manner. As an alternative, you may obtain (at your expense) from a qualified independent appraiser acceptable to us a written appraisal of the wholesale value of the Vehicle that could be realized at sale. This appraised value will be final and binding on you and us.

12. DEFAULT. You will be in default of this Lease if any of the following occur:

a. You do not make a payment when it is due;

b. You or any of your property becomes the subject of a proceeding (voluntary or involuntary) in bankruptcy, receivership or insolvency, or you make an assignment for the benefit of creditors;

c. You become incompetent or die (if a natural person) or dissolve (if not a natural person);

d. You fail to comply with the insurance requirements of this Lease (see Paragraph 10);

e. You do not maintain or repair the Vehicle as required by this Lease;

f. Any information in your Lease Application (including driver information) is materially false or misleading;

g. The Vehicle is stolen, lost, destroyed, seized or confiscated or is otherwise rendered unavailable or unsuitable for use;

h. You assign, transfer, sublease, rent or pledge this Lease or the Vehicle without our permission or otherwise violate Paragraph 20;

i. You allow the Vehicle to become subject to a lien; or

j. You otherwise fail to comply with any other term, provision or condition of this Lease or fail to keep any other promise made to us.

13. WHAT YOU OWE UPON DEFAULT.

a. *Early Termination Because of Theft or Total Loss.* If we terminate this Lease because of a total loss of the Vehicle as a result of a fire, theft, collision or comprehensive peril for which we have received an amount equal to all insurance proceeds due under the insurance policy that you purchased in accordance with Paragraph 10, plus payment of any deductible, then, if you have complied with all other provisions of this Lease, you will owe us nothing more. If you have not so complied, you will owe us any amounts otherwise due under this Lease as a result of your breach.

b. *Early Termination Because of Any Other Default.* If we terminate this Lease because of any other default, then you agree that you will owe us (i) the Early Termination Charge (see Paragraph 11); (ii) payments accrued under the Lease through the date of termination; (iii) all collection, repossession, storage expenses; (iv) attorneys' fees and disbursements incurred after default and referral to an attorney who is not our salaried employee, not to exceed fifteen percent (15%) of the amount you owe us (or

such lesser rate as may be required under applicable law) and (v) simple interest at a rate of **15%** per annum (or such lesser rate as may be required under applicable law) on all expenses incurred by us and all obligations that you owe after termination, other than earned but unpaid lease charges.

c. *Continuation of Lease.* In the event of theft or a total loss of the Vehicle as described in Paragraph 13(a), instead of declaring a default we may voluntarily elect to continue the Lease by substituting a comparable replacement vehicle reasonably acceptable to you and us.

14. OUR RIGHTS AND REMEDIES IF YOU DEFAULT. We will have all of the rights and remedies provided by this Lease and by law. We also will have right to sue you for damages and/or recovery of the Vehicle. We also may take the Vehicle from you without demand permitted by law (or, if demand is required by law, upon compliance with such legal requirements). You agree that we may enter your property or the property where the Vehicle is stored in order to take it, so long as it is done peaceably. If there is any personal property in the Vehicle when we take the Vehicle from you, we may take the personal property and store it for you. If we take the Vehicle you will not be released from any obligation under this Lease.

15. RETURN OF VEHICLE AT SCHEDULED TERMINATION DATE. This Lease is scheduled to end **1** month after the last payment is due, unless you and we agree to extend this Lease. If you and we extend this Lease, the scheduled termination date will be the date upon which you and we agree in writing. On the scheduled termination date of this Lease, you may either purchase

the Vehicle (see Paragraph 16) or return the Vehicle to a reasonable location designated by us in good condition, without damage, excessive wear or use (see Paragraph 18) and without excessive mileage (see Paragraph 9a), and you will pay any amount you owe under this Lease, plus **$250** Disposition Fee. You also agree to pay (a) the cost of such repairs or replacements needed because of excessive wear or use (see Paragraph 18) regardless of whether such repairs or replacements are made in order to put the Vehicle in good working order and condition and (b) any excess mileage charge (see Paragraph a). If you fail to return the Vehicle on its scheduled termination date, you agree to continue to pay the Monthly Payment shown in Paragraph 3. Your continued payment of these amounts does not permit you to keep the Vehicle beyond the scheduled termination date of this Lease, and you agree to pay us for any damage we may suffer because you failed to return the Vehicle at the end of the Lease.

16. OPTION TO PURCHASE. You have the option to purchase the Vehicle **"AS IS"** at the scheduled termination of this Lease, provided all sums due under this Lease have been paid by you and you notify us **15** days prior to the scheduled termination of this Lease. The price you will pay us will be the Estimated Residual Value of Vehicle (see Paragraph 8), **PLUS** a **$250** Purchase Option Fee **PLUS** any official fees and taxes applicable to the purchase of the Vehicle.

Prior to the scheduled termination of this Lease and provided you are not in default (see Paragraph 12), then, upon **15** days prior notice, you have the option to purchase the Vehicle **"AS IS"** for an amount determined by **ADDING** (a) the Base Monthly Payment (see Paragraph 3(a)) times the number of Monthly Payments not yet made, **PLUS** (b)

the "Estimated Residual Value of Vehicle" (see Paragraph 8), **PLUS** (c) a Purchase Option Fee of **$250**, and then **SUBTRACTING** from this sum the unearned Lease charge calculated in accordance with an Actuarial Method. Under this method of determining the unearned lease charge, the monthly lease charges (including those for the month in which the early termination occurs) are earned in advance on the scheduled due dates of your Monthly Payments and your Monthly Payments are deemed to have been received on their scheduled due dates (see Paragraph 3 for the Total Lease Charge). You will also owe any official fees and taxes applicable to the purchase of the Vehicle.

17. MAINTENANCE, REPAIRS AND OPERATING EXPENSES. You are responsible for and agree to pay for all maintenance and repairs to keep the Vehicle in good working order and condition and any other expenses associated with operating the Vehicle. You will service the Vehicle according to the manufacturer's recommendations as outlined in the Owner's Manual and the Maintenance Schedule folder or as requested by the manufacturer in any recall campaign and you will complete all necessary service records.

18. EXCESSIVE WEAR AND USE. Excessive wear and use includes: (a) glass that is damaged or that you have tinted; (b) damaged body, fenders, metal work, trim or paint; (c) missing wheel covers, jack or wheel wrench; (d) torn dash, floor covers, seats, headliners, upholstery or interior work or trunk liners; (e) any tires (including care) that are missing, not of comparable quality to the originals or with less than 1/8 inch of tread remaining; (f) damage from water, hail or sand; (g) any damage that makes the Vehicle either unsafe or unlawful to operate; or (h) any

other damage, whether or not covered by insurance that would cost more than **$50** to repair or replace.

19. WARRANTIES AND EXCLUSIONS OF WARRANTIES. Except for a warranty of description of the Vehicle and a warranty against interference with your interest under this Lease, the only warranties covering the Vehicle are the standard manufacturer's express warranties. You are authorized to receive the benefit of the manufacturer's warranties on behalf of us. In the event you become involved in any litigation, arbitration or other dispute resolution proceeding regarding such manufacturer's warranties, you will promptly notify Assignee in writing of the proceeding in the manner provided in Paragraph 32. You agree that Assignee is a necessary party to any such proceeding. You will also have the benefits of any extended warranty, or service contract purchased in connection with this Lease. **YOU UNDERSTAND THAT LESSOR MAKES NO EXPRESS OR IMPLIED WARRANTIES COVERING THE VEHICLE. IN PARTICULAR, LESSOR MAKES NO EXPRESS OR IMPLIED WARRANTIES OF VEHICLE CONDITION, MERCHANTABILITY, DURABILITY OR FITNESS FOR A PARTICULAR PURPOSE OR USE COVERING THE VEHICLE, AND LESSOR EXPRESSLY DISCLAIMS ANY SUCH EXPRESS OR IMPLIED WARRANTIES.**

20. NO ASSIGNMENT BY YOU. YOU AGREE NOT TO ASSIGN, TRANSFER, SUBLEASE, RENT OR PLEDGE THIS LEASE OR THE VEHICLE WITHOUT OUR EXPRESS WRITTEN CONSENT, NOR WILL YOU DO ANYTHING TO INTERFERE WITH OUR OWNERSHIP OF THE VEHICLE.

21. ASSIGNMENT BY US. You agree that Assignee and any future assignee of this Lease may pledge or reassign this Lease and ownership of the Vehicle and any of its benefits or burdens except as otherwise provided by applicable law. You agree that neither the Assignee nor WOFC (if it is not the Assignee) shall have to make repairs to the Vehicle, maintain the Vehicle, obtain any insurance or perform any other service the Dealer has agreed to perform under this Lease; you will look directly to the Dealer for these services.

22. NOTICE OF ACCIDENTS AND COOPERATION. You agree to cooperate fully with us and any insurance company in the investigation and defense of any and all claims arising from possession and use of the Vehicle. You will make a complete report to Assignee within 48 hours after any accident, theft or loss involving the Vehicle. You will provide Assignee with all information available regarding the time, place and the nature of the accident, theft or loss, the persons involved and any resulting injuries or damage. You will promptly deliver to Assignee all papers and documents received by you or by any operator of the Vehicle in connection with any claim begun or threatened against us, you or any operator of the Vehicle. You will provide us or our representative reasonable time and opportunity to examine the damaged Vehicle. You will comply with all laws and regulations requiring the reporting of accidents, thefts or loss involving the Vehicle.

23. LIMITATION OF LIABILITY. We shall not be liable for any loss of profits or other indirect or consequential damages or inconveniences which may result to you from any damages to, or defect in, the Vehicle or for the time needed to repair or service the Vehicle. Monthly

Payments shall continue and not be reduced or delayed during this time.

24. SECURITY DEPOSIT. You agree to pay a refundable security deposit as indicated in Paragraph 1(d). We will deduct from such deposit any charges you may have under this Lease. We may retain the security deposit until all amounts you owe under this Lease are paid. We will refund to you any part of the security deposit that is left. No interest will accrue on the security deposit while held by us.

25. USE. You agree that:

a. Only authorized licensed drivers will operate the Vehicle;

b. Neither you nor any other person will operate the Vehicle while under the influence of alcohol, illegal narcotics or prescription or non-prescription drugs if the instructions prohibit operating a motor vehicle;

c. You will keep the Vehicle free of all fines, liens and encumbrances and will pay such fines or remove any such liens and encumbrances immediately (if you do not, we may do so, and any amounts paid by us shall be an additional amount owed by you under this Lease);

d. You will not use the Vehicle illegally, improperly or for hire;

e. You will not use the Vehicle to pull trailers if recommended against by the manufacturer;

f. You will not remove the Vehicle from the continental United States; and

g. You will not alter, mark or install equipment in the Vehicle without our consent.

26. LICENSE, REGISTRATION, TAXES AND INSPECTION. You agree to pay for titling, registration and licensing and for all inspections of the Vehicle required by any government authority during the term of this Lease. You will also pay all excise, use, personal property, gross receipts and other taxes incurred during the term of this Lease with respect to the use and operation of the Vehicle except those levied on our net income. The taxes you must pay will be included in the Amount Due When Lease Is Signed (see Paragraph 1) or your Monthly Payment (see Paragraph 3) or separately billed to you by Lessor. Lessor may change your Monthly Payment increases or decreases in taxes.

27. ODOMETER DISCLOSURE. Federal law requires you to disclose the Vehicle's mileage and certain related information to the Lessor at the end of the Lease and at other times in connection with the transfer of ownership of the Vehicle. You may be fined and/or imprisoned if you fail to complete the disclosure requested or if you make a false statement.

28. INSPECTION. You agree to allow us to inspect the Vehicle at any reasonable time and place. [Illegible] injuries, claims, demands and expenses arising out of the [illegible] maintenance, use or operation of the Vehicle.

30. SEVERABILITY AND CHOICE OF LAW. If any part of this Lease is not valid according to any applicable law, all other parts nevertheless will remain enforceable. The law at the place where you signed this Lease will govern this Lease.

31. HEIRS AND REPRESENTATIVES. This Lease will bind and benefit you, your heirs, representatives and successors and will also bind and benefit us and our successors and assigns.

32. NOTICES. All notices to you will be made to the last address provided to us in writing. All notices to us made in accordance with the provisions of this Lease must be made in writing to the respective addresses set forth above or to such other address as we provide in accordance with this Paragraph 32.

33. NO WAIVER. Our excuse of a default does not mean that a later occurrence of that or any other default will be excused. Any failure or delay by us in exercising any of our rights or remedies under this Lease will not cause us to lose them, and we may exercise them at any later time.

34. LIABILITY. (a) If there are more than one of you, each of you shall be liable, separately and together, for all Monthly Payments (see Paragraph 3) and all other amounts that may at any time be due and owing to us under this Lease. (b) IF YOU ARE A CORPORATION, THE PERSON SIGNING THIS LEASE ON YOUR BEHALF REPRESENTS AND WARRANTS THAT HE OR SHE HAS FULL AUTHORITY TO SIGN THIS LEASE ON YOUR BEHALF.

35. DELIVERY RECEIPT. By signing this Lease, you agree that (a) you received and examined the Vehicle described in this Lease, (b) the Vehicle is as described in this Lease, and (c) the Vehicle is in good working order and condition.

36. AUTHORITY OF DEALER. THE DEALER IS AN INDEPENDENT CONTRACTOR AND IS *NOT* AFFILIATED WITH WOFC OR ASSIGNEE (IF NOT WOFC AS AN AGENT, PARTNER OR JOINT VENTURE. NEITHER THE DEALER NOR ANY OF ITS EMPLOYEES IS AUTHORIZED TO MAKE ANY ORAL OR WRITTEN PROMISE, AFFIRMATION, REPRESENTATION OR WARRANTY TO YOU ON BEHALF OF WOFC OR ASSIGNEE (IF NOT WOFC).

THIS LEASE CONTAINS THE ENTIRE AGREEMENT BETWEEN YOU AND US. There are no other agreements between you and us except those included in writing in this Lease. No change of this Lease, no course of performance and no other agreement between you and us will be binding unless in writing and signed by you and us. **Lessee (and Co-Lessee) initials.** [/s/ illegible]

NOTICE: BY SIGNING BELOW, YOU AGREE TO ALL THE PROVISIONS ON *BOTH* SIDES OF THIS LEASE: (1) YOU UNDERSTAND THAT EARLY TERMINATION OR DEFAULT MAY SUBJECT YOU TO A SUBSTANTIAL CHARGE. (2) IF THIS LEASE CONTAINS ANY BLANK SPACES, HAVE THEM FILLED IN. (3) YOU ARE ENTITLED TO A COMPLETELY FILLED-IN COPY OF THIS LEASE AND OF ANY OTHER AGREEMENTS, POLICIES OR CERTIFICATES THAT YOU SIGNED OR AGREED TO PURCHASE.

BY SIGNING BELOW, YOU ACCEPT THE TERMS AND CONDITIONS OF THIS LEASE.

YOU SIGNED THIS LEASE AND RECEIVED A COPY AT: GLEN HEAD (CITY) NY (STATE) on 5 (Mo.) 13 (Day) 95 (Yr.)

CAUTION: IT IS IMPORTANT THAT YOU THOROUGHLY READ THE CONTRACT BEFORE YOU SIGN IT.

LESSEE: RICHARD D. COHEN CO-LESSEE: _____

BY: /s/ Richard Cohen BY: _____

Dealer accepts this Lease and hereby assigns all of its right, title and interest in and to this Lease and in the Vehicle described herein to assignee under the terms of the WOFC Customer Lease Plan Dealer Agreement.

Dealer/Lessor: LAZARUS FRERES & CO. INC. D/B/A RANGE ROVER LAND

BY: Kathleen [Illegible]

GUARANTY

TO CAUSE THE DEALER TO LEASE THE VEHICLE TO THE LESSEE, WHOEVER SIGNS BELOW AS THE "GUARANTOR" JOINTLY AND SEVERALLY UNCONDITIONALLY GUARANTEES PAYMENT (AND NOT MERELY COLLECTION) OF ALL SUMS OWING UNDER THIS LEASE. THIS MEANS THAT IF THE LESSEE FAILS TO PAY WHEN DUE ANY MONEY THAT IS OWED ON THIS LEASE. THE GUARANTOR WILL PAY IT WHEN ASKED. EACH GUARANTOR ALSO AGREES TO BE BOUND EVEN IF ONE OR MORE OTHER PERSONS GUARANTEE PAYMENT OF THIS LEASE. EACH GUARANTOR ALSO AGREES TO BE BOUND EVEN IF WE DO ONE OR MORE OF THE FOLLOWING: (A) GIVE THE LESSEE MORE TIME TO PAY ONE OR MORE PAYMENTS, (B) GIVE A RELEASE IN FULL OR IN PART TO THE LESSEE OR ANY OF THE OTHER GUARANTORS, (C) ACCELERATE ANY PAYMENT DUE

FROM THE LESSEE IN ACCORDANCE WITH THIS LEASE, (D) RENEW, EXTEND, ASSIGN, REASSIGN OR PLEDGE THIS LEASE, (E) RELEASE OR EXCHANGE ANY SECURITY OR (F) PROCEED DIRECTLY AGAINST THE GUARANTOR (OR ANY OF THEM) WITHOUT FIRST PROCEEDING AGAINST ANY LESSEE OR SEEKING TO COLLECT ANY SECURITY. EACH GUARANTOR ACKNOWLEDGES SIGNING THIS GUARANTY ON THE SAME DATE AS LESSEE SIGNED THE LEASE AND RECEIVING A COMPLETED COPY OF THIS LEASE AND THIS GUARANTY AT THE TIME OF SIGNING. THIS GUARANTY MAY NOT BE TERMINATED SO LONG AS ANY LESSEE HAS ANY OBLIGATIONS REMAINING UNDER THIS LEASE.

GUARANTOR: (SEAL) ADDRESS:

GUARANTOR: (SEAL) ADDRESS:

World Omni Financial Corp.
P.O. Box 991817
Mobile, AL 36691-1817
(800) 553-2650

[LOGO]

March 02, 1998

RICHARD D. COHEN
12582 TORBAY DR
BOCA RATON FL 33428

1. NOTICE OF REPOSSESSION AND RIGHT TO REDEEM/REINSTATE

Date of Repossession:	02/27/98
Date of Contract:	05/13/95
Account Number:	01-12-0320-01173-01173
Vehicle Description:	95 LAND ROV DISCOVER
Vehicle Identification Number	SALJY1241SA151437

We have repossessed the vehicle described above. It will not be sold until 10 days after the date of this notice at the earliest. After that you can still get it back any time before it is actually sold.

As of the date of this Notice, you must pay $25,218.99 which does NOT include expenses to get the vehicle back.

The longer you wait, the more you may have to pay to get the vehicle back. If the vehicle is sold and the sale price is less than the total amount you owe, you may be responsible for the difference.

Please contact us to get the vehicle back.

Collection Department

2. NOTICE OF SALE

☒ PRIVATE SALE: The property described above will be sold at a private sale at any time after 10 days from the Date of Notice shown above, unless redeemed by you prior to such sale.

☐ PUBLIC SALE: The property described above will be offered for sale at public auction to the highest bidder on the date and at the place and time indicated below, unless redeemed by you prior to such sale.

DATE OF SALE:
TIME OF SALE:
PLACE OF SALE:

World Omni Financial Corp.
P.O. Box 991817
Mobile, AL 36691-1817
(800) 553-2650

[LOGO]

July 24, 1998

RICHARD D COHEN
12582 TORBAY DR
BOCA RATON FL 33428

RE: Account Number:	01-12-0320-01173-01173
Vehicle Description:	95 LAND ROV DISCOVER
Vehicle Identification Number:	SALJY1241SA151437
Date of Sale:	04/19/98
Method of Sale:	Private Sale
Selling Price:	$11,600.00

Dear Customer:

The vehicle described above which was repossessed from you has been sold. This statement outlines the manner in which we applied the sale proceeds.

REPOSSESSION ACCOUNTING STATEMENT
(Computation of Deficiency or Surplus Balance)

Unpaid Balance on your Contract		$ 23,796.22
ADD:		
Accrued Interest Charges	$ 142.76	
Disposition Fee	250.00	
Late Charges	75.38	
DEDUCT:		
Security Deposit	750.00	
Unearned Lease Charges	296.68	
BALANCE OWED PRIOR TO SALE:		23,217.68
SALE PROCEEDS:		11,600.00

DEDUCT:		
Expenses of Sale	95.00	
Expenses of Retaking & Storage	157.42	
Collection Expenses	110.00	
AMOUNT APPLIED TO CONTRACT		11,237.58
DEFICIENCY BALANCE **(Amount you owe)**		**$ 11,980.10**

Please send your check in the amount stated, within 30 days from today's date. If you have any questions, please call our office at the number listed above.

World Omni Financial Corp.

DEALER NAME: Range Rover Lend — 56.674.8500

☐ Lease ☐ Purchase Account # _____ Amount Requested $_____ CAP Cost $_____ MSRP $_____ MONTHLY PAYMENT DATE DESIRED BY CUSTOMER _____

STANDARD CREDIT APPLICATION

Application Number _____
Date 5-6-95
Dealer Name _____
Dealer's # _____
Salesperson Anthony Bucco
Phone No _____
Stock # _____

Before completing this form please read the directions carefully (Check appropriate box)

☒ If you are applying for individual credit and relying on your own assets and income please complete Section A, only. However, if you are relying on income from alimony, child support, or the income or assets of another person as the basis for repayment, complete Sections A and B

☐ If you are married and live in a community property state, please complete Sections A and B

☐ If this is a joint credit application, please complete Sections A and B

—A— YOUR PERSONAL CREDIT HISTORY —5 YEAR MINIMUM—

PRINT FULL NAME: FIRST Richard MIDDLE Dale LAST Cohen SR/JR — SOCIAL SECURITY NO [illegible] — DATE OF BIRTH MO/DAY/YR [illegible] — HOME PHONE (516) 938 2965

PRESENT ADDRESS: NUMBER AND STREET 12 Pondview Court — CITY Jericho — COUNTY — STATE NY — ZIP 11753 — LIVED THERE YEARS [illegible] MONTHS

RENT BY MO ☐ LEASE ☐ OWN ☒ — LANDLORD OR MORTGAGE HOLDER NAME [illegible] — MO PAYMENT OR RENT $ 2,004.00 — ☐ Unmarried (Single) ☐ Married ☐ Separated — No of Dependents [illegible]

PREVIOUS HOME ADDRESS IF LESS THAN 5 YEARS: NUMBER AND STREET [illegible] — CITY [illegible] — COUNTY [illegible] — STATE [illegible] — ZIP [illegible] — LIVED THERE YEARS [illegible] MONTHS [illegible]

EMPLOYED BY ☒ SELF ☐ OTHERS ☐ — NAME Colonial Fish Co. — BUSINESS ADDRESS, NUMBER AND STREET [illegible] — CITY [illegible] — STATE [illegible] — HOW LONG YEARS [illegible] MONTHS [illegible] — BUS. PHONE NO [illegible]

TRADE OR OCCUPATION Fish Packer — GROSS SALARY OR WAGES $ 100,000 — NAME OF PREVIOUS EMPLOYER [illegible] — ADDRESS [illegible] — NO YEARS [illegible]

Alimony, child support, or separate maintenance income need not be revealed if you do not wish to have it considered as a basis for repaying this obligation.

TYPE OF OTHER INCOME Dividends & Interest — SOURCE [illegible] — GROSS AMOUNT $ 200,000 — ☐ WEEK ☐ MONTH ☒ YEAR

NAME AND ADDRESS OF PARENT OR NEAREST RELATIVE NOT LIVING WITH ME — NAME [illegible] — ADDRESS [illegible] — PHONE NO [illegible] — RELATIONSHIP [illegible]

NAME AND ADDRESS OF PERSONAL FRIEND — NAME [illegible] — ADDRESS [illegible] — PHONE NO [illegible] — KNOW HIM/HER HOW LONG [illegible]

BANK ACCOUNT — NAME OF BANK [illegible] — BRANCH NAME AND CITY [illegible] — CHECKING ☐ SAVINGS ☐ NO ACCOUNT ☐ — CHECKING ACCOUNT NO [illegible]

YOUR OPERATOR'S LICENSE NO [illegible] — STATE NY

LAST CAR FINANCED — NAME OF CREDITOR [illegible] — BALANCE DUE OR DATE PAID [illegible] — TRADING IN THIS CAR? YES ☐ NO ☒

INSURANCE COMPANY [illegible] — POLICY NO [illegible] — EXPIRATION DATE [illegible]

COVERAGE ☐ DED COLL ☐ LIABILITY ☒ COMP ☐ OTHER

CREDIT REFERENCES OR INSTALLMENT OBLIGATIONS — INCLUDE FINANCE COMPANIES, BANKS, CREDIT CARDS, CHARGE ACCOUNTS. INCLUDE NAME(S) OF APPLICANT IN WHICH CREDIT CAN BE VERIFIED. IF OTHER THAN SHOWN ABOVE

NAME OF CREDITOR [illegible] — ADDRESS [illegible] — ACCOUNT NO [illegible] — BALANCE $ [illegible]

THE CAR WILL BE REGISTERED IN NAME OF R. C. and D. Cohen — NUMBER AND STREET [illegible] — CITY [illegible] — STATE [illegible] — OPERATOR'S LICENSE NO [illegible]

HAS ANY OF YOUR PROPERTY EVER BEEN REPOSSESSED? ☒ — ARE THERE UNSATISFIED JUDGEMENTS (SUITS PENDING) AGAINST YOU? YES ☐ NO ☒

IF YES (WHEN) _____

HAVE YOU BEEN PERSONALLY INVOLVED IN A BANKRUPTCY PROCEEDING (IN THE LAST 10 YEARS)? YES ☐ NO ☒ — ARE YOU AN ENDORSER OR GUARANTOR ON ANY OTHER LOAN OR CONTRACT? YES ☐ NO ☒ — MILITARY STATUS ☒ N/A ☐ ACTIVE DUTY ☐ RESERVE ☐ INACTIVE

—B— THE OTHER PARTY'S CREDIT HISTORY —5 YEAR MINIMUM—

PRINT FULL NAME: FIRST — MIDDLE — LAST — SR/JR — SOCIAL SECURITY NO — DATE OF BIRTH MO/DAY/YR — HOME PHONE

PRESENT ADDRESS: NUMBER AND STREET — CITY — COUNTY — STATE — ZIP — LIVED THERE YEARS MONTHS

RENT BY MO ☐ LEASE ☐ OWN ☐ — LANDLORD OR MORTGAGE HOLDER NAME — MO PAYMENT OR RENT $

PREVIOUS HOME ADDRESS IF LESS THAN 5 YEARS: NUMBER AND STREET — CITY — COUNTY — STATE — ZIP — LIVED THERE YEARS MONTHS

EMPLOYED BY ☐ SELF ☐ OTHERS ☐ — NAME — BUSINESS ADDRESS NUMBER AND STREET — CITY — STATE — HOW LONG YEARS MONTHS — BUS PHONE NO

TRADE OR OCCUPATION — GROSS SALARY OR WAGES $ — NAME OF PREVIOUS EMPLOYER — ADDRESS — NO YEARS

Alimony, child support, or separate maintenance income need not be revealed if you do not wish to have it considered as a basis for repaying this obligation.

TYPE OF OTHER INCOME — SOURCE — GROSS MONTHLY AMOUNT $

BANK ACCOUNT — NAME OF BANK — BRANCH NAME AND CITY — CHECKING ☐ SAVINGS ☐ NO ACCOUNT ☐ — CHECKING ACCOUNT NO

YOUR OPERATOR'S LICENSE NO — STATE

CREDIT REFERENCES OR INSTALLMENT OBLIGATIONS — INCLUDE FINANCE COMPANIES, BANKS, CREDIT CARDS, CHARGE ACCOUNTS. INCLUDE NAME(S) OF APPLICANT IN WHICH CREDIT CAN BE VERIFIED. IF OTHER THAN SHOWN ABOVE

NAME OF CREDITOR — ADDRESS — ACCOUNT NO

TO BE COMPLETED BY SELLER —FOR CREDITOR'S USE ONLY—

(1) Cash Price (incl. tax, reg. fees) $ — (1)

(2) Down Payment: Cash $ — Rebate $ — Net Trade $ — (Trade Allow $ — Owed on Trade $ —) $ — (2)

(3) Unpaid Balance of Cash Price (1 - 2) $ — (3)

(4) Other Charges (Specify) $ — $ — (4)

(5) Amount Finance (3 & 4) $ — (5)

(6) Finance Charge $ — (6)

(7) Time Balance (5 & 6) $ — (7)

(8) Payable in — Mo. Installments of $ — (8)

Annual Percentage Rate — % Used Car Miles —

New Car Invoice Cost $ —

New / Used / Demo	Year	Make	Model	Body Style

Vehicle Identification Number — Optional Equipment: Air ☐ P/S ☐ P/B ☐ Auto Tr. ☐ Other —

Trade	Make	Model	Body Style
Yr.			

Dealer Name and Signature

(SELLER SELECTION OPTIONS) Vehicle Options: Valid entries are checked (has option) and Blank (does not). NOTE: Only one of 3PSD, 4SPD, and 5SPC may be entered

AUTO	Automatic transmission	4WD	Four wheel drive	PSEAT	Power seats
3SPD	Three speed transmission (see note above)	PBRK	Power brakes	A/C	Air conditioning
4SPD	Four speed transmission (see note above)	PSTR	Power steering	FM	FM stereo radio
5SPD	Five speed transmission (see note above)	PWIN	Power windows	TAPE	Tape deck
				S/R	Sun roof
				VNLRF	Vinyl roof
				CRSE	Cruise control
				SPRTW	Sports wheels

VEHICLE INSURANCE is required for the full term of the Contract, at your expense, against the hazards of fire, theft and accidental physical damage (including collision). This insurance must protect the interests of you and the lender. The policies issued by the insurance company will designate the terms and conditions. YOU MAY CHOOSE THE PERSON THROUGH WHOM ANY INSURANCE IS OBTAINED.

IF YOU WISH TO APPLY FOR VEHICLE INSURANCE IN CONNECTION WITH THIS CREDIT APPLICATION, COMPLETE AN INSURANCE APPLICATION FORM. ☐ (Check)

I/we certify that the information provided on this application is, to the best of my/our knowledge, complete and accurate. I/we understand that the financial institution(s) will rely on the information to judge my/our credit worthiness, and will retain the application and information whether or not this application is approved. Further, I/we authorize the investigation of my/our credit and employment history. I/we authorize the lender to release information about its experience with me/us. I/we understand that false statements may subject me/us to criminal penalties.

FAIR CREDIT REPORTING ACT DISCLOSURE: This application for credit may be submitted by the Dealer to various financial institutions. Before this application is submitted, the Dealer will disclose to you the name and address of the institution(s) who will receive copies of this application.

NEW YORK AND OHIO RESIDENTS: SEE THE REVERSE SIDE OF THIS APPLICATION FOR FURTHER IMPORTANT DISCLOSURES AND INFORMATION.

Applicant's Signature [illegible] — Date 5-6-95 — Co-Applicant's Signature (CHECK WHICH APPLIES) ☐ INDIVIDUAL ☐ PARTNERSHIP ☐ CORPORATION — Date —

WROP 333 (10/93) — C/SA 2011

App. 25

8604536 qw

Manheim's Gate ORLANDO

9500 Bachman Road • Orlando, FL 32824
(407) 438-1000 • Fax (407) 240-9785

TITLE NUMBER 72415083

STATE TITLE RECD'D FL DATE 3/09/1998

SELLER'S COPY AND ODOMETER DISCLOSURE STATEMENT

SALVAGE

	1998-014 19-0502	04/08/ 1998	3006	800671	19-0502

| | | | | |

IN THE COUNTY COURT, IN AND FOR
PALM BEACH COUNTY, FLORIDA

WORLD OMNI FINANCIAL CORP.,	: Case No.: Case No. SC 00-124.RD
Plaintiff,	: DEFENDANT'S ANSWER, AFFIRMATIVE DE-
vs.	: FENSES AND COUN-
RICHARD D. COHEN,	: TERCLAIM AND DEMAND FOR JURY
Defendant	: TRIAL

Defendant Richard D. Cohen ("Cohen"), appearing pro se, hereby appears the Complaint and says that each and every allegation not specifically admitted below is hereby denied and as to each number paragraph states:

1. Admitted for jurisdictional purposes only.

2. Cohen is without sufficient knowledge to admit or deny the allegations in this paragraph and those allegations are therefore denied. Cohen demands strict proof thereof.

3. Cohen is without sufficient knowledge to admit or deny the allegations in this paragraph and those allegations are therefore denied. Cohen demands strict proof threof.

4. Admitted.

5. Deny.

6. Cohen is without sufficient knowledge to admit or deny the allegations in this paragraph and those allegations are therefore denied. Cohen demands strict proof thereof.

7. Admitted.

8. Deny.

9. Deny.

10. Deny.

11. Deny.

AFFIRMATIVE DEFENSES AND COUNTERCLAIMS

Counter-Plaintiff Richard D. Cohen ("Cohen") file their Counterclaim against Plaintiff/Counter-Defendant World Omni Financial Corp. (World Omni") and allege as follows:

12. This is an action for damages in excess of $15,000 exclusive of interest, costs and attorneys fees

13. This Court has subject matter jurisdiction over this case pursuant to Article V, Section 5 of the Florida Constitution and pursuant to Florida common law.

14. At all material times World Omni was and is qualified to do business in Palm Beach County, Florida.

15. Venue is appropriate in Palm Beach County, Florida because the causes of action accrued in Palm Beach County.

16. This Court has personal jurisdiction over World Omni because they invoked in the Court's jurisdiction by bringing the Complaint.

17. All conditions precedent to the filing of these counterclaims have occurred or have been waived.

Factual Background

18. On May 13, 1995, Cohen, as Lessee, entered into a Closed End Motor Vehicle Lease Agreement for Land Rover Vehicles (the "Lease") with Lazarus Freres & Co. d/b/a Range Rover ("Lazarus"), as Lessor, covering a 1995 Land Rover Discovery bearing Vehicle Identification Number SALJY124SA151437 for a term of thirty six (36) months commencing on May 13, 1993 and continuing through May 14, 1998.

19. Concurrently therewith, Lazarus assigned all of it's right, title and interest in the Lease to World Omni.

20. Upon information and belief, World Omni thereafter further assigned all of it's right, title and interest in the Lease to Bank of America, Illinois, as Collateral Agent, pursuant to a Pledge and Security Agreement.

21. The Lease was entered into in Glen Head, New York.

22. Paragraph 30 of the Lease provides that "[t]he law of the place where you signed this Lease will govern this Lease".

23. Sales tax computed in accordance with the then prevailing sales tax rate of 8.5% was incorporated into the monthly lease payments of $711.20 required under the Lease. This is evidenced by the fact that the term "N/A" appears as the entry for "Sales/Use/Lease/Other Tax" in Paragraph 3b of the Lease, and is further evidenced by the fact that for the period beginning in June, 1995 and for each month thereafter through

and including June, 1996, World Omni invoiced Cohen for $711.20 with no provision for sales tax.

24. In June, 1996, Cohen moved from New York to Florida and notified World Omni of his change of address.

25. Beginning with the July, 1998 lease invoice, World Omni began invoicing Cohen for $753.87, which consisted of the $721.20 monthly lease payment reserved in the Lease (which already included the New York sales tax as aforesaid) plus $42.67 in Sales Uses Tax, presumably computed at the applicable Florida rate.

26. Cohen did not notice the double billing of sales tax until October, 1997 and erroneously paid duplicate sales tax for the fifteen (15) month period commencing July, 1996 and continuing through and including September, 1997, resulting in an aggregate of $643.05 in mistaken sales tax payments to World Omni. In October, 1997, Cohen took a setoff and deduction in the sum of $643.05. against the $711.20 monthly lease payment, and remitted to World Omni his check for the $68.15 difference along with his cover letter dated October 6, 1997 explaining the basis for the setoff.

27. World Omni wrongfully refused to accept the setoff and wrongfully continued to invoice Cohen for the setoff amount, late charges on, the setoff amount, Florida sales tax, and late charges on the unpaid Florida sales tax for the balance of the lease term.

28. In an attempt to resolve the matter, Cohen initiated several telephone calls to World Omni, most notably one to a Mr. Schmidt, wherein Cohen explained that he would be only too happy to pay Florida Sales Tax at a rate of 6.5% provided that they credit the monthly lease payment for the 8.5% New York Sales Tax already included in the $711.20 monthly payment. Schmidt responded by saying that New York will not refund to World Omni the sales tax previously paid to them. Cohen replied by stating that (1) he had no standing to apply to New York for a refund since he was neither the titleholder nor the registrant of the vehicle nor the remitter of the sales tax as far as New York was concerned; (2) to the extent that New York was unwilling to refund the unearned portion of the sales tax, this was World Omni's problem and responsibility; and (3) the terms of the Lease and the prior course of dealing and course of performance between the parties unequivocally established that 8.5% sales tax was already incorporated in the $711.20 monthly payment reserved in the Lease.

29. Cohen fully and timely paid the $711.20 monthly lease payment reserved under the Lease each and every month throughout the lease term through and including the February, 1998 payment (which covered the charges accruing through March, 13, 1998).

30. In February, 1998, the vehicle which was the subject of the Lease was "rear-ended" by another car, damaging the rear bumper of the leased vehicle. The driver of the other car, not wanting to put the matter through

her insurance company, offered to pay for the necessary repairs to the leased vehicle and called in her credit card number to North Dade Range Rover where the vehicle was taken for repair, and authorized them to charge the repairs to her credit card.

31. On or about February 27, 1998, notwithstanding the unassailable fact that Cohen fully and timely paid and performed all of his obligations under the Lease in strict accordance with the terms of the Lease, World Omni purported to repossess the vehicle from the premises of North Dade Range Rover, before North Dade had the opportunity to perform the repairs that had been authorized. On March 2, 1998, World Omni sent Cohen a Notice of Repossession.

32. On March 13, 1998, World Omni sent Cohen a monthly lease invoice thereby superceding and negating the previous Notice of Repossession.

33. Notwithstanding the foregoing, Cohen was notified by letters from World Omni dated May 28, 1998 that the leased vehicle was sold, and claiming a deficiency balance of $11,837.34.

34. World Omni falsely and maliciously reported and continues to report to various credit reporting bureaus, including but not limited to Equifax, TransUnion and Transamerica, that Cohen was delinquent in payment of his obligations under the Lease (when in fact he was not) and that the vehicle had been repossessed (even though such repossession was wrongful and in blatant

violation of the terms of the Lease), creating the false impression that Cohen is a deadbeat.

35. Cohen relies upon the availability of credit for the conduct of his business and personal affairs.

36. Cohen's prospective creditors rely upon statements made by Cohen's past and existing creditors contained in credit reports issued by the various credit bureaus in making their decisions as to whether or not (or to what extent) to grant credit to Cohen and on what terms.

37. World Omni's false and defamatory statements to the credit reporting agencies have severely impaired and at times completely precluded Cohen's ability to obtain credit and/or have resulted in Cohen not being able to obtain credit on the most competitive terms which would have been otherwise available to Cohen absent World Omni's false and defamatory statements.

38. As a direct result of the foregoing, Cohen has incurred credit costs, in the form of higher interest rates, higher downpayment requirements, higher origination fees, additional collateral requirements, etc., that would not have had to have been incurred absent World Omni's false and defamatory statements. In addition, Cohen has lost and forfeited valuable business opportunities because of his inability to obtain credit on competitive terms which would otherwise been available to him absent World Omni's false and defamatory statements.

First Affirmative Defense – Estoppel

39. Cohen realleges paragraphs 18-38 as if fully set forth herein.

40. As a result of World Omni's failure and/or refusal to permit North Dade Ranger Rover to effectuate the repairs to the vehicle that were authorized, World Omni should be estopped from recovering damages that could and would have been mitigated as a result of such repairs.

Second Affirmative Defense – Lack of Standing

41. Cohen realleges paragraphs 18-38 as if fully set forth herein.

42. As a result of World Omni's assignment of the Lease to Bank of America, Illinois, World Omni lacks the requisite standing to prosecute this action.

Third Affirmative Defense – Wrongful Repossession and Sale

43. Cohen realleges paragraphs 18-38 as if fully set forth herein.

44. Because Cohen was not in default of the payment or performance of his obligations under the Lease, there was no basis for World Omni's repossession and sale of the vehicle and World Omni should be barred from seeking the recovery of any deficiency occasioned in connection with such sale.

Count I – Breach of Contract

45. Cohen realleges paragraphs 18-38 as if fully set forth herein.

46. World Omni breached the Lease by wrongfully repossessing the vehicle on February 27, 1999 even though the Lease was fully paid in accordance with the terms thereof through March 13, 1999.

47. As a result of World Omni's breach, Cohen was deprived of use and possession of the vehicle for fifteen (15) days for which he had already paid and is entitled to a refund of $355.60 representing the value of the use of which he was deprived. In addition, Cohen is also entitled to a refund of the $750 security deposit that was paid by him upon execution of the Lease.

WHEREFORE, Cohen demands a judgment in his favor against World Omni for compensatory damages, interest, and costs.

Counts II – Breach of Contract

48. Cohen realies paragraph 18-38 as though fully set forth herein.

49. World Omni further breached the Lease by failing to credit Cohen for the unearned portion of the New York Sales Tax included in the monthly lease payments for the period from July, 1996 through February, 1998.

50. There is a 2% difference between the applicable 8.5% New York Sales Tax and the applicable 6.5% Florida Sales Tax.

51. As a result of the foregoing, Cohen was overcharged and therefore overpaid approximately $14.22 (2% of $711.20) each month for a period of twenty (20) months beginning in July, 1996 and continuing through February, 1998, resulting in an aggregate of $284.40 in overcharges/overpayments.

WHEREFORE, Cohen demands a judgment in his favor against World Omni for compensatory damages, interest and costs.

Count III - Libel

52. Cohen realleges paragraphs 18-38 as though fully set forth herein.

53. World Omni's statements about Cohen to the credit bureaus, although false, accuse Cohen of immoral, unprofessional and unethical conduct and of conduct incompatible with the proper exercise of his business and personal affairs, and constitute libel per se.

54. As a direct and proximate result of World Omni's statements, Cohen's reputation and credit has been severely damaged.

55. World Omni's conduct as alleged in this Counterclaim was willful and wanton.

WHEREFORE, Cohen demands judgment in his favor against World Omni for compensatory damages, in an amount in excess of $15,000 plus costs of suit.

DEMAND FOR JURY TRIAL

Cohen pursuant to Florida Rule of Civil Procedure 1.430 hereby demands a jury trial on all issues so triable in the above captioned matter.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Anwer, Affirmative Defenses, Counterclaim and Demand for Jury Trial has been furnished via U.S. Mail to: Dennis B. Freeman, P.A., Aventura Corporate Center, 20801 Biscayne Blvd., Suite 304, Aventura, Florida 33180 on the 2nd day of February, 2000.

RICHARD D. COHEN
Defendant *Pro Se*
21870 Cartagena Drive
Boca Raton, Florida 33428
(561) 883-6227

By: /s/ Richard D. Cohen
Richard D. Cohen

IN THE COUNTY COURT IN AND FOR
PALM BEACH COUNTY, FLORIDA

CASE NO.: SC 00-124.RD

WORLD OMNI FINANCIAL CORP.,

Plaintiff,

vs.

RICHARD D. COHEN,

Defendant.

_____/

PLAINTIFF'S MOTION FOR FINAL SUMMARY JUDGMENT ON DEFENDANT'S COUNTERCLAIM WITH SUPPORTING MEMORANDUM OF LAW

Plaintiff/Counter-Defendant, WORLD OMNI FINANCIAL CORP. ("WORLD OMNI"), by and through its undersigned attorneys, pursuant to Florida Rule of Civil Procedure 1.510, submits this motion for an order granting it final summary judgment against Defendant/Counter-Plaintiff, RICHARD D. COHEN ("COHEN") on his Counterclaim. In support of its motion, WORLD OMNI states as follows:

1. This is an action arising out of a March 13, 1995 Closed-End Vehicle Lease Agreement between COHEN and Lazarus Freres & Co. d/b/a Range Rover (the "Lease Agreement") (the "Dealer"). Pursuant to the terms of the Lease Agreement, a copy of which is annexed as Exhibit "A," COHEN leased a 1995 Land Rover Discovery (the "vehicle") for a period of 36 months. The Lease Agreement was assigned by the Dealer to WORLD OMNI.

2. COHEN defaulted under the Lease Agreement by failing to make full monthly lease payments to WORLD

OMNI beginning January 13, 1998. As a result of COHEN's default under the Lease Agreement, WORLD OMNI repossessed the vehicle on March 5, 1998 and sold it at auction in a commercially reasonable manner on April 10, 1998.

3. WORLD OMNI initiated this action against COHEN by service of a Complaint, a copy of which is annexed as Exhibit "B," seeking to recover the deficiency balance in the sum of $11,980.10 which resulted from the sale of the vehicle.

4. On or about February 2, 2000, COHEN filed his Answer to the Complaint with Affirmative Defenses and Counterclaim against WORLD OMNI, a copy of which is annexed as Exhibit "C."

5. In the Counterclaim, COHEN alleges that he entered into the Lease Agreement with the Dealer in Glenhead, New York. As required by New York law, COHEN paid the Sales and Use Tax for the entire Lease Agreement at the then prevailing rate of 8.5%. His monthly lease payment was $711.20 under the Lease Agreement. (Counterclaim, ¶23).

6. In June of 1996, COHEN moved from New York to Florida. As demonstrated below, Florida law required WORLD OMNI to then collect for Florida Sales and Use Tax. Beginning in July of 1996, WORLD OMNI raised COHEN's monthly lease payment to $753.87, which consisted of the $711.20 monthly lease payment and $42.67 in Sales and Use Tax (6% as required by Florida law). (Counterclaim, ¶25).

7. COHEN alleges that he did not notice the "double billing" for some 15 months until October of 1997. (Counterclaim, ¶26).

8. COHEN admits that he did not pay WORLD OMNI the entire monthly payment of $753.87 beginning in October of 1997. Rather, he unilaterally took a "set-off" in the amount of $643.05 (15 months x $42.67 which was the Florida Sales and Use Tax). (Counterclaim, ¶26).

9. COHEN acknowledges that he only paid $711.20 to WORLD OMNI under the Lease Agreement through February, 1998. (Counterclaim, ¶29). This amount did not include the $42.60 for Sales and Use Tax required under Florida law. (Counterclaim, ¶29). Based on COHEN's failure to make the required lease payments of $753.87, the vehicle was repossessed by WORLD OMNI.

10. The Counterclaim against WORLD OMNI purports to allege three causes of action including two counts for breach of contract (the Lease Agreement) and one count for libel premised upon WORLD OMNI's charging COHEN Florida Sales and Use Tax when he moved to Florida in June of 1996.

11. For purposes of this motion, the record evidence in this case demonstrates that the State of Florida required WORLD OMNI to collect for Sales and Use Tax on the vehicle when he moved to Florida. *See*, Florida Statute Section 212.06(8)(a), Section 12A-1.007, F.A.C.; and Technical Assistant Advisement No. 98A-037, Florida Department of Revenue. In short, COHEN's misconstrued interpretation of the State of Florida's taxation on lease payments on vehicles originally leased in another state and moved, to Florida is unsupported by law or evidentiary facts. Thus, there are no genuine material issues of

fact presented. WORLD OMNI is entitled to final summary judgment on COHEN's Counterclaim as a matter of law.

WHEREFORE, WORLD OMNI respectfully requests that the Court grant final summary judgment in its favor and against COHEN on his Counterclaim, together with such other and further relief as the Court may deem just and proper.

MEMORANDUM OF LAW

WORLD OMNI'S MOTION FOR FINAL SUMMARY JUDGMENT SHOULD BE GRANTED

It is hornbook law that summary judgment is appropriate where there are no genuine issues and material fact and the movant is entitled to judgment as a matter of law. *See, Andre v. Pomeroy,* 35 N.Y. 2d 361, 362 N.Y.S. 2d 131, 133 (1974); §3212 of the New York Civil Practice Law & Rules (McKinney's 1997); *Noris v. Silver*, 701 So. 2d 1238 (Fla. 3d DCA 1997); *Wills v. Sears Roebuck & Co.,* 351 So. 2d 29 (Fla. 1977). For the reasons which follow, there are no genuine issues of material fact presented that WORLD OMNI was required to collect for Florida Sales and Use Tax when COHEN moved to Florida in June of 1996. Therefore, WORLD OMNI is entitled to final summary judgment as to COHEN's Counterclaim as a matter of law.

In spite of COHEN's allegations, the State of Florida required WORLD OMNI to collect for Sales and Use Tax on a leased vehicle without regard to its prior use or tax paid on purchases outside the state. To this point, Florida Statute Section 212.06 entitled **Sales, Storage, Use Tax; Collectible from Dealer; "Dealer" defined; Dealers to**

Collect from Purchasers; Legislative Intent as to scope of tax, provides as follows:

> (8)(a) . . . the rental or *lease of tangible personal property* which is used or stored in this state shall be *taxable without regard to its prior use or tax paid on purchase outside this state.* (Emphasis added).

Further, 12A-1.007(14), FAC, provides in relevant part as follows:

> (a) The rental or lease of an aircraft, boat, mobile home, or motor vehicle, which is used or stored in this state, *shall be taxable without regard to its prior use or tax paid on the purchase outside this state.* See also, Technical Assistance Advisement No. 98A-037, Florida Department of Revenue (the "Revenue Opinion") (Annexed as Exhibit "D").

In discussing the taxability on leases of a motor vehicle in Florida, the Revenue Opinion notes as follows:

> The *lease of a motor vehicle in Florida was subject to sales and use tax even though the vehicle had been used and was taxed on its purchase in another state prior to being moved to and registered in Florida.* The rental or lease of tangible personal property used or stored in Florida is taxable regardless of whether the property was used or taxed in another state. See 212.06(8), F.S.; Rule 12A-1.007(14), F.A.C. (Emphasis added).

The underlying facts addressed in the Revenue Opinion are strikingly similar to the facts in the case at bar. In the Revenue Opinion, a 1997 Toyota Avalon was leased under a New York Motor Vehicle Lease Agreement

dated December 12, 1996. The lessee paid the Sales and Use Tax of $1,211.81 to the State of New York concurrent with the signing of the lease agreement. The wife (the driver of the leased vehicle since inception) and two sons relocated to the State of Florida in November of 1997 requiring that the vehicle be garaged and registered in Florida. The lessor then assessed an additional 6% tax on the monthly lease payment representing Florida Sales and Use Tax. The lessor indicated that the additional tax was pursuant to Florida Statute Section 212.06(8)(a).

Here, as in Revenue Opinion, the additional Florida Sales and Use Tax assessment was disputed by the lessee.

In relying upon Florida Statute Section 212.06(8)(a) and Rule 12A-1.007(14), F.A.C., The Florida Department of Revenue stated as follows:

> It is the department's position that the *statute is clear in providing that a lease or rental of tangible personal property used or stored in Florida is taxable irrespective of its prior use or prior taxable status in another state. Therefore, your lessor is correct in charging you tax on your automobile lease.* (Emphasis added).

Contemplating a relocation of the lessee, the Lease Agreement allows WORLD OMNI to increase or decrease taxes which may change the monthly payment. Paragraph 26 of the Lease Agreement provides as follows:

> 26. **LICENSE, REGISTRATION, TAXES AND INSPECTION.** . . . *Lessor may or change your Monthly Payment for increases and decreases in taxes.* (Emphasis added).

Given the foregoing, WORLD OMNI had no choice but to charge COHEN for Florida Sales and Use Tax when he

moved to Florida. COHEN's misconstrued interpretation of "double billing" is legally and factually untenable. COHEN cannot legitimately dispute that under controlling statutes WORLD OMNI was required to charge him for Florida Sales and Use Tax under the Lease Agreement when he moved to Florida. Accordingly, WORLD OMNI is entitled to final summary judgment on COHEN's Counterclaim premised on the contrary.

CONCLUSION

WORLD OMNI requests that the Court enter an Order granting final summary judgment in its favor and against COHEN on his Counterclaim, together with such other and further relief as the Court may deem just and proper.

RITTER CHUSID BIVONA
& COHEN, LLP
Attorneys for World Omni
Financial Corp.
7000 West Palmetto Park Road
Suite 400
Boca Raton, Florida 33433
(561) 394-2180
(561) 394-2582 (fax)

By: /s/ Mitchel Chusid
MITCHEL CHUSID
FLA. BAR NO.: 879282

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. Mail on this 2nd day of May, 2000 to: **Richard D. Cohen,** 21870 Cartagena Drive, Boca Raton, Florida 33428.

RITTER CHUSID BIVONA
& COHEN, LLP
Attorneys for World Omni
Financial Corp.
7000 West Palmetto Park Road
Suite 400
Boca Raton, Florida 33433
(561) 394-2180
(561) 394-2582 (fax)

By: /s/ Mitchel Chusid
MITCHEL CHUSID
FLA. BAR NO.: 879282

IN THE COUNTY COURT,
IN AND FOR PALM BEACH COUNTY, FLORIDA

WORLD OMNI FINANCIAL CORP.,	Case No.: Case No. SC 00-124 RD
Plaintiff,	
vs.	
RICHARD D. COHEN,	
Defendant	

DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT DISMISSING THE COMPLAINT

Defendant/Counter-Plaintiff, RICHARD D. COHEN ("COHEN"), pursuant to Florida Rule of Civil Procedure 1.510, submits this cross-motion for an order granting final summary judgment against the Plaintiff/Counter-Defendant, WORLD OMNI FINANCIAL CORP. ("WOFC") dismissing the Complaint in it's entirety. In support of it's cross-motion, COHEN hereby incorporates the attached Affidavit of Richard D. Cohen, sworn to the ___ day of May, 2000, together with the supporting exhibits attached thereto.

I HEREBY CERTIFY that a true and complete copy of the forgoing has been furnished by U.S. Mail and facsimile on this ___ day of May, 2000 to: Ritter, Chusid, Binova & Cohen, LLP, 7000 West Palmetto Park Rd., Suite 400, Boca Raton, Florida 33433.

RICHARD D. COHEN
Defendant *Pro Se*
21870 Cartagena Drive
Boca Raton, Florida 33428
(561) 883-6227

By: /s/ Richard D. Cohen
Richard D. Cohen

//

IN THE COUNTY COURT,
IN AND FOR PALM BEACH COUNTY, FLORIDA

WORLD OMNI FINANCIAL CORP.,	:	Case No.: Case No. SC 00-124.RD
Plaintiff,	:	**AFFIDAVIT IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON DEFENDANT'S COUNTERCLAIM AND IN SUPPORT OF DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT DISMISSING THE COMPLAINT.**
vs.	:	
RICHARD D. COHEN,	:	
Defendant	:	

STATE OF FLORIDA
COUNTY OF PALM BEACH

BEFORE ME, the undersigned authority personally appeared Richard D. Cohen, who being first duly sworn, deposes and says:

1. I am over the age of eighteen and I am resident of Palm Beach County, Florida. I am the Defendant in the within action.

2. I make this affidavit (i) in opposition to the Plaintiff's Motion for Final Summary Judgment on Defendant's Counterclaim, and (ii) in support of the Defendant's Cross-Motion for Final Summary Judgment dismissing the Complaint.

3. The Defendant's arguments, each of which is discussed at length hereinbelow, can be summarized as follows: (1) the statutory section cited by the plaintiff in support of it's motion is inapplicable to the case at bar (the properly applicable statutory

section and related Tax Information Publication is cited herein and/or attached hereto); (2) the "Revenue Opinion" relied upon by the plaintiff is self-serving, constitutionally flawed, erroneous, non-binding and amply distinguishable from the case at bar; (3) even assuming *arguendo* that the transaction is subject to Florida Sales Tax, the plaintiff can offer no explanation for it's attempt to levy Florida Sales Tax not only upon the base amount but also upon the New York Sales Tax already included in the monthly payment thereby resulting in a "tax upon a tax"; (4) the plaintiff is under formal investigation by the Florida Department of Revenue for it's double billing of sales tax; (5) although the plaintiff argues that the transaction is subject to Florida Sales Tax for the period of time during which the leased vehicle was located in Florida, it notably fails to address the entitlement to a credit or refund from New York for the unearned portion of the New York Sales Tax previously paid; (6) multiple taxation of the same goods and services (which the plaintiff seeks to impose upon the defendant) violates the Commerce Clause of the Federal Constitution. (7) the lease between the parties unambiguously provides for an "all inclusive monthly payment" and further provides that the defendant is entitled to receive the benefit of a decrease in sales taxes, which was occasioned by the defendant's relocation from New York to Florida; and (8) upon the inception of the lease, the defendant deposited with plaintiff a security deposit in the sum of Seven Hundred and Fifty Dollars ($750) which provided more than adequate protection to the plaintiff for the default claimed by it, *i.e.* the non-payment of the disputed sales taxes; therefore, the plaintiff's repossession and

sale of the vehicle was overreaching and wrongful.

4. Before proceeding with the legal arguments, I would like to make a visceral appeal to the Court. I am just a lay consumer who entered into a lease to pay an all-inclusive $711.20 per month and should be given the benefit of his bargain. I should not have to deal with a "patchwork quilt" of conflicting and/or inconsistent State Sales Tax Laws. It is not for me to determine whether the New York Sales Tax Law is perhaps overreaching by attempting to capture tax for the entire term of a lease upon lease irrespective of whether of not the vehicle is in New York for the entire term, or whether Florida Sales Tax Law is possibly deficient by failing to provide for a credit of Sales Taxes previously paid to another State.

5. Florida Statute Section 212.06 8(a) cited to by plaintiff in support of it's motion provides that "the rental or lease of tangible personal property which is used or stored in this state shall be taxable without regard to it's prior use or tax paid ***on the purchase outside this state***" [emphasis supplied]. Because the defendant herein is not claiming that he is entitled to a credit as a result of any tax paid as a result of a ***purchase*** outside the state, this section is wholly inapplicable and without relevance to the case at bar. The appropriate statutory section, to which the plaintiff conspicuously omits any reference, is Section 212.6, subsection 7, which provides, in pertinent part, as follows:

> "The provisions of this chapter do not apply in respect to use or consumption of tangible personal property or services . . . upon which a like tax equal to or greater than the

amount imposed by this chapter has been lawfully imposed or paid in another state, territory of the United States, or the District of Columbia."

6. Attached hereto as Exhibit "A" is a true and complete copy of the State of Florida Department of Revenue Tax Information Publication (TIP) #98(A) 117 which provides in pertinent part as follows:

> "Section 212.06(7), F.S., allows a credit to be given on tangible personal property brought into the State of Florida where a like tax has been lawfully imposed and paid in another state. If the amount of the tax paid is equal to or greater than the amount imposed by Florida, ***no additional tax is due***" [emphasis supplied].
>
> "It is the position of the Department that credit shall be given for a like tax paid in another state whether the tax has been paid to the state, or a county of city (local taxes) within the other state provided that the like tax is related to the transaction".

7. The defendant respectfully requests that the Court take judicial notice of the fact that the applicable sales tax rate in Nassau County, New York (where the sales tax for the entire lease term was previously paid) is and was 8.5% and that the applicable sales tax rate in Palm Beach County, Florida is and was 6% at all relevant times herein. The defendant further requests that the Court also take judicial notice of the mathematical axiom that the number 8.5 is greater than the number 6. Since 8.5 is greater

than 6, then pursuant to F.S. Section 212.06(7), ***no additional tax is due.***

8. In order to fully illustrate for the Court why the Revenue Opinion cited by plaintiff in support of it's motion is clearly erroneous as a matter of law, I would first like provide the Court with a brief survey of U.S. Supreme Court decisional law dealing with Federal Constitutional limitations on State taxes. The case of **Complete Auto Transit, Inc.** v. **Brady,** 430 U.S. 274 (1977) established a four prong test for determining the validity of state taxes against a Commerce Clause challenge. A tax is constitutional under the Commerce Clause so long as the tax 1) is applied to an activity with a substantial nexus with the taxing state; 2) is fairly apportioned; 3) does not discriminate against interstate commerce; and 4) is fairly related to the services provided by the state. 430 U.S. at 279. Conceding that the first prong that both New York and Florida each have a substantial nexus, we now reach the second prong of *Complete Auto's* test. To determine whether a tax is fairly and properly apportioned, the tax must be both "internally consistent" and "externally consistent". **Goldberg** v. **Sweet**, 488 U.S. 252, at 261 (1989); **Container Corp.** v. **Franchise Tax Board,** 463 U.S. 159, at 169 (1983). Internal consistency is preserved when the imposition of a tax identical to the one in question by every other State would add no burden to interstate commerce that intrastate commerce would not also bear. This test asks nothing about the degree of economic reality reflected by the tax, but simply looks to the structure of the tax at issue to see whether its identical application by another State in the Union would place interstate commerce at a disadvantage as compared

with intrastate commerce. A failure of internal consistency shows as a matter of law that a State is attempting to take more than its fair share of taxes. If every State were to impose a tax identical to New York's, that is, a sales tax calculated upon the payments accruing under an entire lease term, every lease would be subject to more than one State's tax for the entire lease term. Therefore, the tax acceleration clause violates the principle of internal consistency. External consistency, on the other hand, looks to the economic justification for the State's claim upon the value taxed, to ascertain whether a State's tax reaches beyond that portion of value that it fairly attributable to economic activity within the taxing State. Since a use tax is generally levied to compensate the taxing State for it's incapacity to reach the corresponding sale, it is commonly paired with a sales tax, being applicable only when no sales tax has been paid or subject to a credit for any such tax paid. Since any use tax would have to comply with Commerce Clause requirements, the tax scheme could not apply differently to goods and services purchased out of state from those purchased domestically. It would not apply when another State's sales tax had previously been paid or would apply subject to a credit for such payment. **Oklahoma Tax Commission** v. **Jefferson Lines,** 514 U.S. 175 (1995). Indeed, the District of Columbia and forty four of the forty five States that impose sales and use taxes permit such a credit or exemption for similar taxes paid to other States. See 2 Hellerstein & Hellerstein ¶18.08, p. 18.48; 1 All States Tax Guide ¶256 (1994). As one state court summarized the provisions in force:

> "These credit provisions create a national system under which the first state of purchase or use imposes the tax. Thereafter, no other state taxes the transaction unless there has been no prior tax imposed . . . or if the tax rate of the prior taxing state is less, in which case the subsequent taxing state imposes a tax measured only by the differential rate." **KSS Transportation Corp.** v. **Baldwin**, 9 N.J. Tax 273, 285 (1987).

Turning to the third prong of the *Complete Auto* test, a State may not "impose a tax which discriminates against interstate commerce by providing a direct commercial advantage to local business". A sales tax imposed by a State which is levied in addition to a sales tax already imposed by another State (without credit for the sales tax previously imposed by the first State) clearly discriminates against interstate commerce by providing a direct commercial advantage to local business in the second State since the only way to avoid imposition of multiple sales taxes would be to purchase (or lease) the item in the second State in the first instance. The fourth prong of the *Complete Auto* test demands a fair relation between a tax and the benefits conferred upon the taxpayer by the State; that the measure of the tax be reasonably related to the taxpayer's presence or activities in the State. One could easily argue that New York in seeking to impose it's sales tax upon the lease payments accruing during an entire lease term regardless of whether or not (or to what extent) the property is located in the State for the entire lease term unfairly overreaches. Based upon the foregoing, it is clear that the Commerce Clause of the United States Constitution and prevailing United States Supreme

Court precedents protect a taxpayer from being subjected to the same tax in multiple States unless credit is given for the tax previously paid in the first State.

9. It is a fundamental maxim of statutory construction that a statute is to be construed in a way that would save it's constitutionality. In fact, most statutes incorporate within their framework a so-called "savings clause" rescuing the balance of a statute from a declaration of unconstitutionality if one or more clauses or parts are invalidated. **Dade County** v. **Wiseheart,** Fl. App., 198 So.2d. 94, 97. Since an adoption of the construction of the statute proffered by plaintiff, i.e. that the defendant is subject to Florida Sales Tax without regard to or credit for the amount of Sales Tax previously paid in New York, would result in a declaration of unconstitutionality, the statute must be construed in a way which would save it's constitutionality, *i.e.* to provide the defendant with a credit for taxes previously paid based upon the same transaction in another jurisdiction. It is for this reason that the Revenue Opinion relied upon and cited by plaintiff is constitutionally flawed. It should also be noted that the Revenue Opinion has no binding effect upon this Court since it is neither a judicial pronouncement nor the product of an adversarial process but merely the clearly biased, self-serving opinion of an agency construing a statutory ambiguity in a way that serves it's own interest in maximizing tax revenues. Regardless of whether one agrees or disagrees with the result of the Revenue Opinion, the fact that a Revenue Opinion had to be sought on the issue at all argues well for the proposition that statute is inherently ambiguous and not as "clear cut" and

unambiguous as either the plaintiff or the defendant urge. It is also interesting to note that the Revenue Opinion was not rendered until May 15, 1998, well after the conclusion of the events at issue in this lawsuit. Therefore, it is impossible for the plaintiff to claim reliance upon the Revenue Opinion in it's declaration of default against the defendant. Equally interesting is the fact that the Revenue Opinion does not address the entitlement of the person seeking the opinion to a refund of the unearned potion of the New York Sales Tax. Moreover, the case at bar is distinguishable from the case described in the Revenue Opinion in that the person seeking the Revenue Opinion paid the New York sales tax out of pocket whereas in the case at bar, the New York sales tax was advanced by the plaintiff to be repaid by defendant in equal monthly installments, which installments were included as a component of the monthly lease payments, resulting in the imposition of Florida sales tax not only upon the base lease payment but also upon the New York sales tax included in the monthly payment amount thereby "taxing the tax".

10. Attached hereto as Exhibit "B" is a true and complete copy of the "Lease Calculations" prepared by the plaintiff which was produced in response to the Defendant's First Request for the Production of Documents served herein. As the Court can see, the "Base Rent" is $651.52. However, the Base Monthly Payment under the Lease, attached to the plaintiff's moving papers as Exhibit "A", is $711.20. The $59.68 difference is the New York Sales Tax (together with the Money Factor applicable thereto). In other words, the New York sales tax is already included in the Monthly Lease Payment reserved under the

Lease. When the defendant relocated to Florida in June, 1996, the plaintiff began charging the defendant Florida Sales Tax not only upon the $651.52 "Base Rent" amount but also upon the $59.68 New York Sales Tax also included as part of the $711.20 "Base Monthly Payment" reserved in the Lease thereby "taxing the tax". One need not be a multi-state tax law expert or a constitutional law scholar to know that there is something very wrong with this. While the plaintiff may be able to possibly justify it's attempt to collect Florida Sales Tax based upon the $651.52 "Base Rent" amount, it's attempt to collect Florida Sales Tax based upon the $59.68 New York Sales Tax is absolutely indefensible and warrants no further discussion.

11. Perhaps understandably, the plaintiff also conspicuously neglected to bring to the attention of this Honorable Court the fact that the plaintiff is the subject of an active investigation undertaken by the Florida Department of Revenue specifically concerning it's "double billing of Florida sales and use tax to its lease customers who relocate to Florida from other states". In support of the foregoing, attached hereto as Exhibit "C" is a letter dated April 18, 2000 from the Florida Department of Revenue confirming the aforesaid.

12. While the plaintiff argues that the lease payments are subject to Florida Sales Tax for the period of time during which the leased vehicle was located in Florida, it conveniently avoids any discussion of the efforts it might have undertaken to obtain a refund from the York State Department of Taxation and Finance of the unearned portion of the New York Sales Tax previously paid. The discovery materials adduced by the plaintiff in response to the Defendant's First Request for

Production of Documents demonstrate that the plaintiff made absolutely no effort whatsoever to obtain such a refund despite the fact that New York has established systems and procedures for Applications for Credits and Refunds of Sales or Use Tax. In support of the foregoing, attached hereto as Exhibit "D" is an Application for Credit or Refund of Sales of Use Tax, published by the New York State Department of Taxation and Finance. As an aside, because, as far as New York State is concerned, the defendant was neither the taxpayer nor the title holder of the vehicle, the defendant had no standing to make such an application for refund. In addition, New York Courts, recognizing that the tax acceleration feature inherent in the New York Statute is a fiction, have been very sympathetic to claimants seeking refunds for "unearned taxes". Attached hereto as Exhibit "E" is a State of New York, Division of Tax Appeals case entitled **In the Matter of the Petition of Jennier A. Miehle for a Revision of a Determination or for a Refund of Sales and Use Taxes under Article 28 and 29 of the Tax Law for the Period September 1, 1994 through November 30, 1994** (DTA No. 816201). The Court's attention is specifically directed to Paragraph "G" thereof which provides in pertinent part as follows:

> "Prior to the enactment of Tax Law §1111(i)(A) [the tax acceleration clause] in 1990, sales tax was paid on lease payments as made. If a lease payment was not made, sales tax was not collected. Allowing a refund of sales tax that will not, if fact, be made is in harmony with the statutory language at issue while also avoiding an unreasonable and unfair result (**see, Le**

> **Drugstore Etats Unis v. New York State Board of Pharmacy,** 33 NY2d. 298, 352 NYS 1888; McKinney's Cons Laws of NY, Book 1, Statutes §143; 56 NY Jur, Statutes §211. Moreover, deeming facts is a legal fiction which "should be sparing employed" (**In Re Morris Estate,** 175 Misc. 773, 25 NYS2d 48, ***affd*** 261 App Div 950, 27 NYS2d 188, ***affd*** 287 NY 624). The addition of subdivision (i) to Tax Law §1111 in 1990, which deemed all car lease payments to have been paid as of the date of first payment under the car lease, was a fiction of law resorted to by the legislature solely to accelerate the payment of sales tax and should not be interpreted as transforming something unreal into real so as to bar an appropriate refund of sales tax . . . "

Based on the foregoing, there is ample reason to believe that if the plaintiff bothered to apply for a refund of the unearned sales tax from New York, it would have been successful in it's application. While there is admittedly nothing in the lease that affirmatively requires the plaintiff to make such a refund application, it is respectfully submitted that the implied covenants of good faith and fair dealing inherent in all contracts dictate, at a minimum, that the plaintiff at least make some token effort. Moreover, to the extent that it can be said that the plaintiff is a fiduciary with respect to the sales taxes collected from the defendant and remitted to New York, a fiduciary duty on the part of the plaintiff arises thereby "raising the bar" on the amount of effort required to be expended by the plaintiff in pursuing a refund application. By preferring it's own economic interests to those of the defendant in not initiating

a refund application, the plaintiff breached whatever fiduciary duty it might be said to owe to the defendant.

13. While the statutory and constitutional issues presented herein make for interesting legal discussion, the Court does not have to reach any of the statutory or constitutional issues in order to determine this case. That is because the contract between the parties – in this case, the Lease – is controlling. Although the defendant firmly believes that the terms of the lease unambiguously support the defendant's position, to the extent that the Court finds that there is some ambiguity, in keeping with one of the most fundamental tenets of contract construction, it should be noted that since the plaintiff was the draftsman of the lease, any ambiguities should be construed against the plaintiff. Turning to the Lease, the Court's attention is respectfully directed to Section 3 which provides that the Monthly Payment is $711.20, and further provides that "[t]hese amounts make up the Monthly Payment: (a) Base Monthly Payment – $711.20, (b) Sales/Use/Lease/Other Tax* – N/A". The asterisk references a footnote that reads "Estimated based on current tax rate". Request is hereby made that the Court take judicial notice of the fact that the abbreviation "N/A" means "Not Applicable". Similar reference is made to Section 1 which provides for a "First Monthly Payment in Advance" of $711.20 and another N/A designation assoociated with the Sales Tax line item. Permit me to direct the Court's attention to Section 6 which provides that the "Total Estimated Fees and Taxes Payable During the Lease" is $2304.25 which is comprised of "(a) Title, License, and Registration Fees" in the sum of $149.00 and "(c) Sales/Lease/

Use/Other Taxes" in the sum of $2155.25. Attached hereto as Composite Exhibit "~~E~~" "F" are true and complete copies of thirteen (13) monthly lease invoices which were rendered by the plaintiff for the period beginning June, 1995 and continuing through June, 1996 in the amount of $711.20 each, consistent with the Lease. Permit me to further direct the Court's attention to Section 26 of the Lease which provides as follows:

> "**26. LICENSE, REGISTRATION, TAXES AND INSPECTION.** You [referring to Defendant] agree to pay for titling, registration and licensing and for all inspections of the Vehicle required by any government authority during the term of this Lease. You will also pay all excise, use, personal property, gross receipts and other taxes incurred during the term of this Lease with respect to the use and operation of the Vehicle except those levied upon our net income. The taxes you must pay will be included in the Amount Due When the Lease is Signed (see Paragraph 1), or your Monthly Payment (see Paragraph 3) or separately billed to you by Lessor. Lessor may change your Monthly Payment for increases ***or decreases in taxes*** [emphasis supplied]."

The only conclusion which can be drawn from the foregoing is that the $711.20 Monthly Payment reserved in the Lease was intended to be an all-inclusive amount. It should be noted that although the term "sales tax" is specifically utilized in Sections 1, 3 and 4 of the Lease, it is notably absent in Section 26. Applying the legal maxim of *inclusio unius est exclusio alterius* (inclusion of one excludes the other) which means that if you specify something but not everything of the same

category, the reader may infer that unspecified terms have been deliberately omitted, to the case at bar leads to the conclusion that the term "sales tax" was deliberately omitted from Section 26. Moreover, sales tax would not fall under the penumbra of "other taxes incurred during the term of this Lease with respect to the use and operation of the Vehicle except those levied upon our net income" since a sales tax obligation does not arise by virtue of the use or operation of the vehicle, but is instead the result of a sale or lease of the vehicle. However, if one were to adopt the position that sales tax is included within the scope of Article 26, the defendant would be entitled to a credit against the Monthly Payment by virtue of the fact that the change in the sales tax rate from the 8.5% rate charged in Nassau County, New York, to the 6% rate charged in Palm Beach County, Florida, represents a decrease, and Article 26 requires that the "Lessor may change the Monthly Payment for increases or decreases in taxes."

14. As recited in Section 1(d) of the Lease, the plaintiff acknowledged receipt of a $750 security deposit that was paid by the defendant when the Lease was signed. As will be shown by the chart below, at the time that the plaintiff repossessed the Vehicle, the plaintiff had only $505.68 in possible economic loss, which loss was adequately protected by the $750.00 security deposit. As evidenced by the affidavit of Chris Slader sworn to the 11th day of May, 2000, submitted by the plaintiff in support of it's motion, and the accompanying exhibit, the plaintiff only remitted sales tax to Florida based upon the actual amount received by the plaintiff from the defendant. For example, in October, 1997, when the defendant,

having discovered the double billing of sales tax, took an offset against his Monthly Payment for the aggregate of the Florida Sales Tax previously paid in error for the previous fourteen (14) months as well as the current month, remitting to the plaintiff the net sum of $68.15, the plaintiff treated this payment as a gross payment, inclusive of Florida Sales Tax, remitting $3.85 of this amount to the Florida, and retaining the $64.30 balance for itself.

The following table sets forth the shortfall/surplus amounts relative to the $651.52 Base Rent reflected on the Lease Calculations (Ex. "B") for the period in question and reflects the plaintiff's economic loss:

Month	Amount Paid by Defendant	Amount Retained by Plaintiff	Shortfall/Surplus Relative to Base Rent
October, 1997	$68.15	$64.30	$583.37
November, 1997	$711.20	$646.90	$4.62
December, 1997	$711.20	$670.95	-$19.43
January, 1998	$711.20	$694.98	-$43.46
February, 1998	$711.20	$670.94	-$19.42
TOTAL	$2912.95	$2748.07	$505.68

Regardless of all of the other issues and defenses presented herein, because the $750.00 security deposit more than adequately protected the plaintiff against the economic loss sustained by it, the plaintiff's repossession and sale of the Vehicle was overreaching and wrongful.

15. Based on the foregoing, it is respectfully requested that: (i) the Plaintiff's Motion for Summary Judgment on Defendant's Counterclaim be denied in it's entirety; and (ii) the Defendant's Cross-Motion for Summary Judgment dismissing the Complaint be granted in all respects, together with such other, further and different relief that this Court may deem just proper and equitable.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Richard D. Cohen
Richard D. Cohen

STATE OF FLORIDA)
COUNTY OF PALM BEACH)

The foregoing instrument was acknowledged before me this 26th day of May, 2000 by Richard D. Cohen, who is personally known to me and who did take an oath. In the County of Palm Beach, Florida.

/s/ Sheppard Parr
NOTARY PUBLIC

SHEPPARD PARR
Notary Public - State of Florida
My Commission Expires Feb. 9, 2004
Commission # CC909307

IN THE COUNTY COURT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

WORLD OMNI FINANCIAL CORP.,
Plaintiff,

CIVIL DIVISION

CASE NO. SC 00 124 RD

vs.

RICHARD D. COHEN,
Defendant, /

ORDER GRANTING FINAL SUMMARY JUDGMENT

THIS case came before the court for hearing on Plaintiff's Motion For Summary Judgment On Defendant's Counterclaim. Counsel for Plaintiff/Counter Defendant, World Omni Financial Corp. ("World Omni"), and defendant/counter plaintiff, Richard Cohen ("Cohen"), appeared. The court, having considered the pleadings, affidavits, statutes, administrative codes, and other documents in the court record, finds as follows:

FACTS

Cohen's Counterclaim is based upon his allegation that he made the monthly payments under the terms of the Closed End Motor Vehicle Lease Agreement For Land Rover Vehicles ("Lease" Exhibit A, attached to the Complaint) and that World Omni wrongfully repossessed his vehicle. Count 1, Breach Of The Lease, alleges that Cohen made all payments under the Lease; Count 2, Breach Of The Lease, alleges that Cohen was entitled to a tax refund for a portion of the New York State sales tax that was included in the monthly payments; Count 3, alleges that

World Omni committed liable by notifying third parties of the default and repossession.

There is no genuine issue as to any material fact. It is uncontradicted that Cohen failed to pay the entire monthly lease payments when World Omni increased the lease payments to include a 6% sales and use tax imposed by Florida law. World Omni repossessed and sold the vehicle. Cohen alleges either that he was not required to pay the Florida sales and use tax on the Lease or that he was entitled to a refund on a portion of the New York sales tax which was paid at the inception of the lease.

CONCLUSIONS OF LAW

The Lease permits World Omni to change the monthly payments for increases or decreases in taxes (paragraph 26). The State of Florida required World Omni to collect the sales and use tax on the leased vehicle when Cohen moved to Florida. Section 212.06(8)(a), Fla. Stat., states "The rental or lease of tangible personal property which is used or stored in this state shall be taxable without regard to its prior use or tax paid on purchase outside this state."; See also Section 12 A – 1.000 (14), FAC. Payment of the New York Lease was due at the inception of the lease on the total amount of the base payments for the entire term of the lease. State – Reg., NY Tax RPTR (Doc. 11); In the matter of Petition on of Jennifer Miehle, State of New York, Division of Tax Appeals, attached to Defendant's Cross Motion For Summary Judgment Dismissing The Complaint. Cohen has presented no authority to support his claim that he was entitled to a credit for the payment of the New York sales tax which was paid by World Omni and then prorated in his monthly payments.

Based on the foregoing, it is

ORDERED AND ADJUDGED that plaintiff's Motion For Judgment on the Counterclaim is granted.

DONE AND ORDERED in Delray Beach, Palm Beach County, Florida this 11th day of July, 2000.

/s/ Susan Lubitz
SUSAN LUBITZ
COUNTY COURT JUDGE

Copies furnished:

Michael Chusid, Esq.
7000 West Palmetto Park Road, Ste. 400
Boca Raton, Fl 33433

Richard D. Cohen
21870 Cartagena Drive
Boca Raton, Fl 33428

IN THE COUNTY COURT, IN AND FOR
PALM BEACH COUNTY, FLORIDA

WORLD OMNI FINANCIAL CORP.,	:	Case No.: Case No.
Plaintiff,	:	SC 00-124.RD
vs.	:	
RICHARD D. COHEN,	:	
Defendant	:	

DEFENDANT'S MOTION FOR LEAVE TO SERVE AND FILE AND AMENDED ANSWER AND COUNTERCLAIM

Defendant/Counter-Plaintiff, RICHARD D. COHEN ("COHEN"), pursuant to Florida Rule of Civil Procedure 1.190, submits this motion for leave to serve and file and Amended Answer and Counterclaim. In support of it's motion, COHEN states as follows:

1. This action was commenced by service of a summons and complaint on or about January 19, 2000. A true and complete copy of the summons and complaint is annexed hereto as Exhibit "A".

2. The issue was joined by service of an Answer and Counterclaim, a true and complete copy of which is annexed hereto as Exhibit "B", on February 2, 2000.

3. At the time of the service and filing of the original Answer and Counterclaim, Cohen overlooked various affirmative defenses and counterclaims for which leave is herein sought for inclusion in the Amended Answer and Counterclaim, a true and complete copy of which is annexed hereto as Exhibit "C".

4. No obvious prejudice would accrue to World Omni by permitting the amendment for which leave is herein sought since no discovery has been conducted by the World Omni.

5. The differences between the original Answer and Counterclaim, on the one hand, and the proposed Amended Answer and Counterclaim, on the other, are as follows:

   i) Paragraph 28 was changed to reflect the fact that the correct rate of Sales Tax in Palm Beach County, Florida is 6% (not 6.5% as stated in the original Answer).

   ii) The addition of a "Fourth Affirmative Defense – Unconstitutionality" (Para. 45-46.).

   iii) The addition of a "Fifth Affirmative Defense – No Economic Loss" (Para. 47-48).

   iv) The addition of a "Sixth Affirmative Defense – Bad Faith Repossession" (Para. 49-53).

   v) Paragraph 59 was similarly changed to reflect the correct rate of sales tax in Palm Beach County, Florida.

   vi) The addition of an additional Counterclaim denominated as "Count IV – Breach of Fiduciary Duty" (Para. 65-67).

   vii) The addition of an additional Counterclaim denominated as "Count V – Breach of Implied Covenants of Good Faith and Fair Dealing" (Para. 68-70).

I HEREBY CERTIFY that a true and complete copy of the forgoing has been furnished by U.S. Mail on this 25th

day of January, 2001 to: Ritter, Chusid, Binova & Cohen, LLP, 7000 West Palmetto Park Rd., Suite 400, Boca Raton, Florida 33433.

RICHARD D. COHEN
Defendant *Pro Se*
21870 Cartagena Drive
Boca Raton, Florida 33428
(561) 883-6227

By: /s/ Richard D. Cohen
Richard D. Cohen

IN THE COUNTY COURT, IN AND FOR
PALM BEACH COUNTY, FLORIDA

WORLD OMNI FINANCIAL CORP.,	:	Case No.: Case No. SC 00-124.RD
Plaintiff,	:	DEFENDANT'S AMENDED ANSWER, AFFIRMATIVE DEFENSES AND COUNTER-CLAIM AND DEMAND FOR JURY TRIAL
vs.	:	
RICHARD D. COHEN,	:	
Defendant	:	

Defendant Richard D. Cohen ("Cohen"), appearing *pro se,* hereby answers the Complaint and says that each and every allegation not specifically admitted below is hereby denied and as to each number paragraph states:

1. Admitted for jurisdictional purposes only.

2. Cohen is without sufficient knowledge to admit or deny the allegations in this paragraph and those allegations are therefore denied. Cohen demands strict proof thereof.

3. Cohen is without sufficient knowledge to admit or deny the allegations in this paragraph and those allegations are therefore denied. Cohen demands strict proof thereof.

4. Admitted.

5. Deny.

6. Cohen is without sufficient knowledge to admit or deny the allegations in this paragraph and those allegations are therefore denied. Cohen demands strict proof thereof.

7. Admitted.

8. Deny.

9. Deny.

10. Deny.

11. Deny.

AFFIRMATIVE DEFENSES AND COUNTERCLAIMS

Counter-Plaintiff Richard D. Cohen ("Cohen") file their Counterclaim against Plaintiff/Counter-Defendant World Omni Financia. Corp. (World Omni") and allege as follows:

12. This is an action for damages in excess of $15,000 exclusive of interest, costs and attorneys fees.

13. This Court has subject matter jurisdiction over this case pursuant to Article V, Section 5 of the Florida Constitution and pursuant to Florida common law.

14. At all material times World Omni was and is qualified to do business in Palm Beach County, Florida.

15. Venue is appropriate in Palm Beach County, Florida because the causes of action accrued in Palm Beach County.

16. This Court has personal jurisdiction over World Omni because they invoked the Court's jurisdiction by bringing the Complaint.

17. All conditions precedent to the filing of these counterclaims have occurred or have been waived.

Factual Background

18. On May 13, 1995, Cohen, as Lessee, entered into a Closed End Motor Vehicle Lease Agreement for Land Rover Vehicles (the "Lease") with Lazarus Freres & Co. d/b/a Range Rover ("Lazarus"), as Lessor, covering a 1995 Land Rover Discovery bearing Vehicle Identification Number SALJY124SA151437 for a term of thrity six (36) months commencing on May 13, 1995 and continuing through May 14, 1998.

19. Concurrently therewith, Lazarus assigned all of it's right, title and interest in the Lease to World Omni.

20. Upon information and belief, World Omni thereafter further assigned all of it's right, title and interest in the Lease to Bank of America, Illinois, as Collateral Agent, pursuant to a Pledge and Security Agreement.

21. The Lease was entered into in Glen Head, New York.

22. Paragraph 30 of the Lease provides that "[t]he law of the place where you signed this Lease will govern this Lease".

23. Sales tax computed in accordance with the then prevailing sales tax rate of 8.5% was incorporated into the monthly lease payments of $711.20 required under the Lease. This is evidenced by the fact that the term "N/A" appears as the entry for "Sales/Use/Lease/Other Tax" in Paragraph 3b of the Lease, and is further evidenced by the fact that for the period beginning in June, 1995 and for each month thereafter through and

including June, 1996, World Omni invoiced Cohen for $711.20 with no provision for sales tax.

24. In June, 1996, Cohen moved from New York to Florida and notified World Omni of his change of address.

25. Beginning with the July, 1996 lease invoice, World Omni began invoicing Cohen for $753.87, which consisted of the $711.20 monthly lease payment reserved in the Lease (which already included the New York sales tax as aforesaid) plus $42.67 in Sales Uses Tax, presumably computed at the applicable Florida rate.

26. Cohen did not notice the double billing of sales tax until October, 1997 and erroneously paid duplicate sales tax for the fifteen (15) month period commencing July, 1996 and continuing through and including September, 1997, resulting in an aggregate of $643.05 in mistaken sales tax payments to World Omni. In October, 1997, Cohen took a setoff and deduction in the sum of $643.05 against the $711.20 monthly lease payment, and remitted to World Omni his check for the $68.15 difference along with his cover letter dated October 6, 1997 explaining the basis for the setoff.

27. World Omni wrongfully refused to accept the setoff and wrongfully continued to invoice Cohen for the setoff amount, late charges on the setoff amount, Florida sales tax, and late charges on the unpaid Florida sales tax for the balance of the lease term.

28. In an attempt to resolve the matter, Cohen initiated several telephone calls to World Omni, most notably one to a Mr. Schmidt, wherein Cohen explained that he would be only too happy to pay Florida Sales Tax at a rate of 6.0% provided that they credit the monthly lease payment for the 8.5% New York Sales Tax already included in the $711.20 monthly payment. Schmidt responded by saying that New York will not refund to World Omni the sales tax previously paid to them. Cohen replied by stating that (1) he had no standing to apply to New York for a refund since he was neither the titleholder nor the registrant of the vehicle nor the remitter of the sales tax as far as New York was concerned; (2) to the extent that New York was unwilling to refund the unearned portion of the sales tax, this was World Omni's problem and responsibility; and (3) the terms of the Lease and the prior course of dealing and course of performance between the parties unequivocally established that 8.5% New York sales tax was already incorporated in the $711.20 monthly payment reserved in the Lease.

29. Cohen fully and timely paid the $711.20 monthly lease payment reserved under the Lease each and every month throughout the lease term through and including the February, 1998 payment (which covered the charges accruing through March, 13, 1998).

30. In February, 1998, the vehicle which was the subject of the Lease was "rear-ended" by another car, damaging the rear bumper of the leased vehicle. The driver of the other car, not wanting to put the matter through her

insurance company, offered to pay for the necessary repairs to the leased vehicle and called in her credit card number to North Dade Range Rover where the vehicle was taken for repair, and authorized them to charge the repairs to her credit card.

31. On or about February 27, 1998, notwithstanding the unassailable fact that Cohen fully and timely paid and performed all of his obligations under the Lease in strict accordance with the terms of the Lease, World Omni purported to repossess the vehicle from the premises of North Dade Ranger Rover, before North Dade had the opportunity to perform the repairs that had been authorized. On March 2, 1998, World Omni sent Cohen a Notice of Repossession.

32. On March 13, 1998, World Omni sent Cohen a monthly lease invoice thereby superceding and negating the previous Notice of Repossession.

33. Notwithstanding the foregoing, Cohen was notified by letters from World Omni dated May 28, 1998 that the leased vehicle was sold, and claiming a deficiency balance of $11,837.34.

34. World Omni falsely and maliciously reported and continues to report to various credit reporting bureaus, including but not limited to Equifax, TransUnion and Transamerica, that Cohen was deliquent in payment of his obligations under the Lease (when in fact he was not) and that the vehicle had been repossessed (even though such repossession was wrongful and in blatant violation of the

terms, of the Lease), creating the false impression that Cohen is a deadbeat.

35. Cohen relies upon the availability of credit for the conduct of his business and personal affairs.

36. Cohen's prospective creditors rely upon statements made by Cohen's past and existing creditors contained in credit reports issued by the various credit bureaus in making their decisions as to whether or not (or to what extent) to grant credit to Cohen and on what terms.

37. World Omni's false and defamatory statements to the credit reporting agencies have severely impaired and at times completely precluded Cohen's ability to obtain credit and/or have resulted in Cohen not being able to obtain credit on the most competitive terms which would have been otherwise available to Cohen absent World Omni's false and defamatory statements.

38. As a direct result of the foregoing, Cohen has incurred credit costs, in the form of higher interest rates, higher down payment requirements, higher origination fees, additional collateral requirements, etc., that would not have had to have been incurred absent World Omni's false and defamatory statements. In addition, Cohen has lost and forfeited valuable business opportunities because of his inability to obtain credit on competitive terms which would otherwise been available to him absent World Omni's false and defamatory statements.

First Affirmative Defense – Estoppel

39. Cohen realleges paragraphs 18-38 as if fully set forth herein.

40. As a result of World Omni's failure and/or refusal to permit North Dade Ranger Rover to effectuate the repairs to the vehicle that were authorized, World Omni should be estopped from recovering damages that could and would have been mitigated as a result of such repairs.

Second Affirmative Defense – Lack of Standing

41. Cohen realleges paragraphs 18-38 as if fully set forth herein.

42. As a result of World Omni's assignment of the Lease, to Bank of America, Illinois, World Omni lacks the requisite standing to prosecute this action.

Third Affirmative Defense – Wrongful Repossession and Sale.

43. Cohen realleges paragraphs 18-38 as if fully set forth herein.

44. Because Cohen was not in default of the payment or performance of his obligations under the Lease, there was no basis for World Omni's repossession and sale of the vehicle and World Omni should be barred from seeking the recovery of any deficiency occasioned in connection with such sale.

Fourth Affirmative Defense – Unconstitutionality

45. Cohen realleges paragraphs 18-38 as if fully set forth herein.

46. World Omni's attempt to collect Florida Sales Tax on lease payments which have already been subjected to Sales Tax by the State of New York violates limitations on State taxation imposed by the Commerce Clause of the United States Constitution, as interpreted by the United States Supreme Court.

Fifth Affirmative Defense – No Economic Loss

47. Cohen realleges paragraphs 18-38 as if fully set forth herein.

48. World Omni incurred no monetary damages as a result of the Cohen's failure and refusal to pay the Florida Sales Tax since it only remitted to Florida, Sales tax based upon the actual amount received from the defendant.

Sixth Affirmative Defense – Bad Faith Repossession

49. Cohen realleges paragraphs 18-38 as if fully set forth herein.

50. Because the value of the vehicle at the time of sale at auction (as evidenced by the auction sales price) was substantially less than the Estimated Residual Value of the vehicle set forth in the Lease, World Omni was improperly motivated to repossess the vehicle so that it could charge Cohen with the deficiency between the sales price and Estimated Residual Value.

51. Upon information and belief, the nature and amount of the default alleged by World Omni prior to repossession did not rise to the level necesaary to warrant a repossession under World Omni's normal, standard, and customary operating practices.

52. There was no legitimate risk to World Omni's collateral, *viz*, the vehicle, at the time of repossession.

53. As a result of the aforesaid, the repossession of the vehicle was undertaken by World Omni in bad faith and with an improper motive and purpose.

Count 1 - Breach of Contract

54. Cohen realleges paragraphs 18-38 as if fully set forth herein.

55. World Omni breached the Lease by wrongfully repossessing the vehicle on February 27, 1998 even though the Lease was fully paid in accordance with the terms thereof through March 13, 1998.

56. As a result of World Omni's breach, Cohen was deprived of use and possession of the vehicle for fifteen (15) days for which he had already paid and is entitled to a refund of $355.60 representing the value of the use of which he was deprived. In addition, Cohen is also entitled to a refund of the $750 security deposit that was paid by him upon execution of the Lease.

WHEREFORE, Cohen demands a judgment in his favor against World Omni for compensatory damages, interest, and costs.

Count II – Breach of Contract

57. Cohen realles paragraphs 18-38 as though fully set forth herein.

58. World Omni further breached the Lease by failing to credit Cohen for the unearned portion of the New York Sales Tax included in the monthly lease payments for the period from July, 1996 through February, 1998.

59. There is a 2% difference between the applicable 8.5% New York Sales Tax and the applicable 6.0% Florida Sales Tax.

60. As a result of the foregoing, Cohen was overcharged and therefore overpaid approximately $17.78 (2.5% of $711.20) each month for a period of twenty (20) months beginning in July, 1996 and continuing through February, 1998, resulting in an aggregate of $355.60 in overcharges/overpayments.

WHEREFORE, Cohen demands a judgment in his favor against World Omni for compensatory damages, interest and costs.

Count III – Libel

61. Cohen realleges paragraphs 18-38 as though fully set forth herein.

62. World Omni's statements about Cohen to the credit bureaus, although false, accuse Cohen of immoral, unprofessional and unethical

conduct and of conduct incompatible with the proper exercise of his business and personal affairs, and constitute libel per se.

63. As a direct and proximate result of World Omni's statements, Cohen's reputation and credit has been severely, damaged.

64. World Omni's conduct as alleged in this Counterclaim was willful and wanton.

WHEREFORE, Cohen demands judgment in his favor against World Omni for compensatory damages, punitive damages, in an amount in excess of $15,000 plus costs of suit.

Count IV – Breach of Fiduciary Duty

65. Cohen realleges paragraphs 18-38 as though fully set forth herein.

66. Under governing New York law, World Omni was a fiduciary for the benefit of Cohen and owed a fiduciary duty to Cohen with respect to the collection, administration and payment of sales taxes accruing under the Lease.

67. World Omni breached it's fiduciary duty to Cohen by neglecting, failing and refusing to apply for a refund (or credit) of the New York Sales Tax incorporated into the Monthly Lease Payments, despite Cohen's demands that it do so and notwithstanding New York case law supporting the right to a refund.

WHEREFORE, Cohen demands judgment in his favor against World Omni for compensatory damages, interest and costs.

Count V – Breach of Implied Covenants of Good Faith and Fair Dealing

68. Cohen realleges paragraphs 18-38 as though fully set forth herein.

69. Under governing New York law, there is a duty of good faith and fair dealing implied in every contract entered into in the State of New York.

70. World Omni breached the implied covenants of good faith and fair dealing by neglecting, failing, and refusing to apply for a refund (or credit) of the New York Sales Tax incorporated in the Monthly Lease Payments, despite Cohen's demands that it do so and notwithstanding New York case law supporting the right to a refund.

WHEREFORE, Cohen demands judgment in his favor against World Omni for compensatory damages, interest and costs.

DEMAND FOR JURY TRIAL

Cohen pursuant to Florida Rule of Civil Procedure 1.430 hereby demands a jury trial on all issues so triable in the above captioned matter.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Anwer, Affirmative Defenses, Counterclaim and Demand for Jury Trial has been furnished via U.S. Mail to: Ritter, Chusid, Binova & Cohen, 7000 West Palmetto Park Rd., Suite 400, Boca Raton, Florida 33433 on the ___ day of ___, 2001.

RICHARD D. COHEN
Defendant *Pro Se*
21870 Cartagena Drive
Boca Raton, Florida 33428
(561) 883-6227

By: _____
Richard D. Cohen

IN THE COUNTY COURT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

CIVIL DIVISION

CASE NO. SC 00 124

WORLD OMNI FINANCIAL
CORPORATION,
Plaintiff,

vs.

RICHARD D. COHEN,
Defendant. /

ORDER

THIS case came before the court on Defendant's Motion For Leave To Serve And File An Amended Answer And Counterclaim. The court, having reviewed the court file, finds that Cohen's Amended Answer And Counterclaim attempts to assert claims which have been previously determined by this court in this case in the Order Granting Final Summary Judgment and Final Judgment on Counterclaim issued on July 11, 2000.

Based on the foregoing, it is

ORDERED AND ADJUDGED that Defendant's Motion For Leave To Serve And File An Amended Answer And Counterclaim is denied except that paragraph 28 is amended by interlineation to substitute 6% for 6-½% as the rate of Florida sales tax.

DONE AND ORDERED in Delray Beach, Palm Beach County, Florida this 26 day of February 2001.

/s/ Susan Lubitz
SUSAN LUBITZ COUNTY
COURT JUDGE

Copies furnished:

Michael Chusid, Esquire, 7000 W. Palmetto Park Road, #400, Boca Raton, FL 33433

Richard D. Cohen, 21870 Cartagena Drive, Boca Raton, FL 33428

IN THE COUNTY COURT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

CIVIL DIVISION

CASE NO. SC 00 124

WORLD OMNI FINANCIAL
CORP.,
Plaintiff,

vs.

RICHARD D. COHEN,
Defendant. /

ORDER ON PLAINTIFF'S MOTION FOR FINAL SUMMARY JUDGMENT

THIS case came before the court for hearing on Plaintiffs Motion for Final Summary Judgment. Plaintiffs counsel and Defendant Richard D. Cohen appeared.

The court, having considered argument, the record, and previous rulings, it is

ORDERED AND ADJUDGED as follows:

1. Plaintiff's Motion for Final Summary Judgment is granted on the issue of liability, as the court has previously ruled that Defendant Richard D. Cohen defaulted on the loan and the vehicle was repossessed in accordance with the contract and the laws of New York and Florida.

2. Plaintiff's Motion for Final Summary Judgment is denied on the issue of standing and damages, as there are genuine issues of disputed material facts.

DONE AND ORDERED in Delray Beach, Palm Beach County, Florida this 9 day of April, 2001.

/s/ Susan Lubitz
SUSAN LUBITZ COUNTY COURT JUDGE

Copies furnished:

Richard D. Cohen 21870 Cartagena Drive Boca Raton, Fl 33428

Mitchel Chusid Ritter Chusid Bivona & Cohen, LLP 7000 West Palmetto Park Road, Ste. 400 Boca Raton, Fl 33433

IN THE COUNTY COURT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

CASE NO. SC 00 124.RF

WORLD OMNI FINANCIAL
CORP.,
Plaintiff,

vs.

RICHARD D. COHEN,
Defendant. /

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT DISMISSING THE COMPLAINT

Plaintiff, World Omni Financial Corp. ("World Omni") by and through its undersigned attorneys, submits this Opposition to Defendant, Richard Cohen's ("Cohen") Motion for Summary Judgment Dismissing the Complaint, and states as follows:

1. Cohen's Motion for Summary Judgment Dismissing World Omni's Complaint (the "Motion") is Cohen's third or fourth attempt at summary judgment and should be denied in its entirety as the record evidence demonstrates that World Omni sold the vehicle it repossessed from Cohen (the "subject vehicle") in accordance with the terms of the operative lease agreement. Cohen's misconstrued interpretation of the lease agreement, which he claims permits him to have the wholesale value of the subject vehicle determined by "independent appraiser" more than four (4) years after the vehicle was sold at auction, is unsupported by the express terms and intent of the lease agreement and flies in the face of logic. Cohen's

right to request an independent appraisal of the wholesale value of the subject vehicle has long since passed. In short, Cohen waived any right he may have under the lease agreement to have the vehicle independently appraised by failing to elect this remedy *before* the subject vehicle was repossessed by World Omni and sold at auction.

2. Indeed, Cohen was given reasonable notification of the sale. He could have exercised his right to have the vehicle appraised at that time. Instead, he did nothing. Cohen waited more than four years and two motions for summary judgment later and now claims that World Omni is not entitled to a deficiency as the "independent appraisal" that he obtained revealed an appraised value exceeding the estimated residual value. Indeed, as demonstrated below: (1) Cohen's belated attempt to have the subject vehicle independently appraised is contrary to existing law and the operative lease agreement; and (2) Cohen's independent appraiser's estimated wholesale value of the subject vehicle at the time of the auction (April 8, 1998) is specious as: (a) the independent appraiser never inspected the vehicle; and (b) the appraiser was never provided with documents relating to the "true" value of the subject vehicle, including, but not limited to, repair records from North Dade Land Rover which revealed the subject vehicle was involved in an *accident in February, 1998*, resulting in *physical damage of $785.55* and *mechanical damage in the amount of $2,557.71*. In fact, World Omni previously filed a Motion to Strike Cohen's Pleadings and a Motion for Entry of Default Judgment based on Cohen's wilful failure to produce the mechanical damage estimate from Land Rover for the subject vehicle. (Annexed as Composite Exhibit "C" to that motion is a complete copy of Land Rover's response to

subpoena served by World Omni containing the estimates for mechanical and body damage). Irvine Fraser, Cohen's "independent appraiser" was not provided with any of the repair history records for the subject vehicle before coming to the conclusion that the wholesale value of the subject vehicle which "could have been realized at sale in April, 1998 is $21,525.00." The only documents relied on by Mr. Fraser were vehicle inspection reports dated February 27, 1998, from National Research and Recovery and Greater Orlando dated March 16, 1998 and a May, 1995 bill of sale for the subject vehicle. *It is undisputed that Mr. Fraser was not provided with any other documentation, including the repair records and/or physical and mechanical damage estimates for the subject vehicle.* (See a copy of Mr. Fraser's May 1, 2002 report annexed as Exhibit "A" to the Motion.) For these reasons alone, there are genuine issues of material fact as to: (1) the reasonable wholesale value of the vehicle; and (2) Mr. Fraser's appraised wholesale value of the subject vehicle. Therefore, the Motion should be denied in its entirety.

3. As noted above, this is the third or fourth motion filed by Cohen for summary judgment and/or seeking dismissal of the Complaint. Therefore, the procedural history of this litigation is significant. On May 13, 1995, Cohen leased the subject vehicle from Lazarus Freres & Co. (the "dealer") for a period of 36 months. The lease was assigned by dealer to World Omni. Cohen defaulted under the lease by failing to make full monthly lease payments to World Omni beginning January 13, 1998. Cohen was sent a Notice of Repossession and Right to Redeem the subject vehicle by World Omni on March 2, 1998, a copy of which is attached as Exhibit "A", advising him that the subject vehicle would not be sold at auction until the

passage of 10 days at the earliest and that he had the right to redeem the vehicle. Cohen did not advise World Omni not to sell the vehicle and/or that he elected to have the wholesale value of the subject vehicle determined by qualified appraisal obtained by him pursuant to Paragraph 11 of the Lease Agreement. (A copy of the Lease Agreement is annexed as Exhibit "B".) *Cohen did nothing.* The subject vehicle was then sold at auction by World Omni in a commercially reasonable manner on April 10, 1998. After deducting authorized expenses from the sale proceeds, a deficiency balance in the amount of $11,980.10 resulted. World Omni brought the instant action against Cohen to recover said deficiency.

4. On April 9, 2002, Judge Lubitz entered an order granting World Omni's Motion for Final Summary Judgment on the issue of liability and ruling that there was an issue of fact as to whether World Omni had standing and damages. World Omni's Motion for Summary judgment on Cohen's affirmative defense of lack of standing was granted by Judge Burton by order dated March 11, 2002. Thus, the only issue remaining is that of damages.

5. By order dated June 11, 2000, Judge Lubitz granted World Omni's Motion for Summary Judgment dismissing all of Cohen's counterclaims.

6. On or about March 26, 2002, Cohen filed a Motion for Summary Judgment Dismissing World Omni's Complaint alleging that World Omni failed to comply with the Lease Agreement by selling the subject vehicle at a salvage auction, not at wholesale and/or in a commercially reasonable manner. By order dated April 19, 2002, Judge Burton denied Cohen's Motion for Summary Judgment dismissing the Complaint.

7. Cohen then filed a Motion for a Rehearing as to Judge Burton's order denying his Motion for Summary Judgment Dismissing the Complaint. By order dated April 30, 2002, Judge Burton denied Cohen's Motion for Rehearing.

8. Then, Cohen filed the instant motion once again seeking summary judgment dismissing World Omni's Complaint. Now, Cohen summarily contends that the appraisal of the subject vehicle he obtained by Mr. Fraser on May 1, 2002, more than four years after the vehicle was repossessed and sold at auction by World Omni, exceeds the estimated residual value, there is no deficiency, and thus World Omni's Complaint must be dismissed for its alleged failure to comply with the Lease Agreement.

9. In spite of Cohen's contentions, the express language and clear intent of the Lease Agreement allows Cohen, to elect, as an alternative, to having the realized value of the vehicle determined at auction, to determine the wholesale value of the vehicle by a qualified appraiser prior to the time the subject vehicle was sold at auction. The Lease Agreement certainly does not allow Cohen to have the vehicle appraised, more than four years after he received the Notice of Repossession and Notice of Sale *and* more than two years after this action was commenced, if Cohen was unhappy with the amount obtained at auction. To this point, Paragraph 11 of the Lease Agreement provides as follows:

> The "Realized Value" of the Vehicle is the price we receive at the time of disposition of the Vehicle minus the reasonable costs of preparation and sale of the Vehicle. For this purpose, we shall *sell the Vehicle at wholesale or otherwise determine its wholesale value in a commercially reasonable*

> *manner.* As an *alternative you may obtain* (at your expense) from a qualified independent appraiser acceptable to us a written *appraisal of the wholesale value of the Vehicle that* ***could*** *be realized at value.* This appraised value will be final and binding on you and us. (Emphasis added.)

10. Here, as noted above, Cohen was advised by World Omni, through the Notice of Repossession and Right to Redeem, that if he did not redeem the vehicle, it would be sold at auction no earlier than 10 days from the date of the notice, and that he would be responsible for the deficiency. Cohen failed to advise: (a) World Omni to hold and not sell the vehicle; and/or (b) that he would like to have the wholesale value of the vehicle determined by an appraiser obtained by him. He did nothing. The vehicle was then sold. Now, four years later, Cohen claims that the appraisal he recently obtained, two years into this litigation, should now prevent World Omni from seeking this deficiency. The plain reading of the operative provision of the Lease Agreement indicates that the wholesale value will be determined in a commercially reasonable manner. As an alternative, Cohen, could have the vehicle "independently appraised" to determine " . . . the wholesale value of the Vehicle that *could be realized at sale.*" (Emphasis added.) This provision does not indicate that Cohen could have the vehicle appraised at any time, even after it is sold at auction. Rather, it indicates that the independent appraisal is to determine the wholesale value of the vehicle that *could* be realized at sale. The realized value of the vehicle was determined at the time of sale. If Cohen's interpretation of this provision is valid, the words "could be" would be substituted with the word "was." Could, by definition, means that the sale had not previously occurred. Thus,

the only way to reasonably interpret this provision is that the election to have the vehicle independently appraised must occur *before* the realized value is established at a commercially reasonable sale. Cohen's misconstrued interpretation of this provision defies logic. This would allow a lessee, such as Cohen, who had his vehicle repossessed, do nothing to prevent the sale after notice, become unhappy with sale price obtained at auction, then have the vehicle "independently appraised" four years after the vehicle was sold and claim that the lessor is not entitled to a deficiency. In fact, it has been held that "Equity aids the vigilant, not those who slumber on their rights." *See In re American Body Armor & Equipment, Inc.*, 17 B.R. 659 (M.D. of Fla. 1994). Here, Cohen received Notice of the Repossession and intended sale. He had the opportunity to have the subject vehicle appraised. He did nothing. Equity, and logic, should prevent him from now claiming a right to have the vehicle appraised four years post-sale. This simply is not what was intended by this provision.

11. Moreover, the only documentation provided by Cohen to Mr. Fraser to perform his "independent appraisal" was the vehicle inspection reports and the bill of sale for the vehicle dated May, 1995. Mr. Fraser acknowledges that he did not observe and/or inspect the subject vehicle. He limited his appraisal based on the documents provided to him by Mr. Cohen. Mr. Fraser was not provided with documents relating to the true condition of the subject vehicle, including, repair history of the vehicle reflecting that the vehicle was involved in an automobile accident in February, 1998, had collision damage and major mechanical problems, would not start, and had to be towed by Mr. Cohen to North Dade Land Rover shortly before it was repossessed. Suffice it to say, without these

documents, Mr. Fraser's "independent appraisal" of the wholesale value of the subject vehicle is unsupported and specious.

12. Moreover, Trena Bobo, World Omni's Manager of Logistics, testified at deposition on April 3, 2002, that the wholesale value of a repossessed vehicle is determined by market conditions of the vehicle at the time of sale based on the condition of the vehicle, as opposed to the Black Book, NADA Guide, and/or Kelly's Blue Book, which are used to evaluate wholesale values of trade-in vehicles (See a copy of Ms. Bobo's deposition which was previously filed in opposition to Cohen's (First) Motion for Summary Judgment Dismissing the Complaint).

13. As testified to by Ms. Bobo, the vehicle condition reports cannot be used to determine the condition of the subject vehicle as these reports were prepared at different times and for different purposes. Indeed, the repossession agent was merely concerned with the high level condition of the vehicle, i.e. whether the vehicle was driveable and/or had major collision damage. The person preparing the report is not concerned with minor damage to the vehicle. One cannot compare the repossession agent's report with the auction's report, as Cohen attempts to do, as the auction is concerned with the potential value of the vehicle and not the condition of the vehicle at the time it is repossessed. (See pages 19-28 of the deposition transcript of Trena Bobo). Thus, Cohen's and/or Mr. Fraser's reliance on the vehicle condition reports to determine the condition of the vehicle and/or its wholesale value at the time of auction is misplaced and unfounded. *Moreover, Cohen admitted that the subject vehicle had physical and mechanical problems in his letter dated August 31, 1998 to World Omni,* a copy of which is annexed as Exhibit C".

Therefore, Mr. Fraser's appraised wholesale value of the vehicle at the time of auction is unsupportable. At the very least, there is a question of fact as to the true value of the vehicle at the time of auction. Thus, the Motion should be denied in its entirety.

14. Based on the foregoing, World Omni submits that there is, at the very least, a question of fact as to the true wholesale value of the vehicle at the time of auction, thus precluding summary judgment in favor of Cohen dismissing the Complaint. Accordingly, Cohen's motion should be denied in its entirety.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was served by telecopier and U.S. Mail on this 12th day of August, 2002 to: **Richard D. Cohen,** 21870 Cartagena Drive, Boca Raton, Florida 33428 (561/883-6146).

RITTER CHUSID BIVONA
& Cohen, LLP
Attorneys for World Omni Financial Corp.
7000 West Palmetto Park Road
Suite 305
Boca Raton, Florida 33433
(561) 394-2180
(561) 394-2582 – Facsimile

By: /s/ Mitchel Chusid
MITCHEL CHUSID
FLA. BAR NO.: 879282
ALLISON L. KAY
FLA BAR NO.: 858330

IN THE COUNTY COURT IN AND FOR
PALM BEACH COUNTY, FLORIDA

WORLD OMNI FINANCIAL CORP., Plaintiff, v. RICHARD D. COHEN, Defendant.	Case No. MC 00-124-RF **NOTICE OF APPEAL**

NOTICE IS GIVEN that Richard D. Cohen appeals to the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida, the orders of this court rendered July 29, 2003 and August 11, 2003. The nature of the order rendered July 29, 2003 (Exhibit "A") is a final judgment after court trial for appellee World OMNI Financial Corp. ("World OMNI"). The nature of the order rendered August 11, 2003 (Exhibit "B") is a final judgment for attorney's fees and costs for appellee World Omni. Copies of the two orders are attached hereto.

Respectfully submitted,

Richard D. Cohen, Esq.
Florida Bar No. 678961
21870 Cartagena Drive
Boca Raton, FL 33428
Tel: (561) 883-6227

-and-

Steven M. Goldsmith, Esq.
Florida Bar No. 324655
Steven M. Goldsmith, P.A.
5355 Town Center Road, Suite 801
Boca Raton, FL 33486
Tel: (561) 391-4900

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. MAIL this 19 day of August, 2003, to: Richard D. Cohen, Esq., 21870 Cartagena Drive, Boca Raton, FL 33428; and Mitchel Chusid, Esq., Ritter, Chusid, Bivona & Cohen, 7000 W. Palmetto Park Road, Suite 305, Boca Raton, FL 33433.

By: /s/ Steven M. Goldsmith
Steven M. Goldsmith

EXHIBIT A

IN THE COUNTY COURT IN AND FOR
PALM BEACH COUNTY, FLORIDA

CASE NO.: MC 00-124-RF

WORLD OMNI FINANCIAL CORP.,

Plaintiff,

vs.

RICHARD D. COHEN,

Defendant. /

FINAL JUDGMENT

Pursuant to the jury verdict rendered in this action on March 13, 2003,

IT IS ADJUDGED that:

1. Plaintiff, World Omni Financial Corp., whose address is 120 Northwest 12th Avenue; Deerfield Beach, Florida 33443, recover from Defendant, Richard D. Cohen,

whose address is 21870 Cartagena Drive, Boca Raton, Florida 33428, the sum of $16,080.92 that shall bear interest at the legal rate from March 13, 2003 for which let execution issue forthwith.

2. Defendant, Richard D. Cohen shall furnish World Omni Financial Corp.'s attorney, Mitchel Chusid, Esquire, Ritter Chusid Bivona & Cohen, LLP, 7000 West Palmetto Park Road, Suite 305. Boca Raton, Florida 33433 with a Fact Information Sheet in Form 1.977 within forty-five (45) days from this date and file a Notice of Compliance with the Clerk of this Court as required by Rule 1.560.

3. That Court hereby reserves jurisdiction to award World Omni Financial Corp. attorney's fees and costs.

ORDERED at West Palm Beach, Florida, on July 28, 2003.

/s/ Joseph Marx
COUNTY JUDGE

Copies furnished to:

Richard D. Cohen, *Pro Se*
Mitchel Chusid, Esq.

EXHIBIT B

IN THE COUNTY COURT IN AND FOR
PALM BEACH COUNTY, FLORIDA

CASE NO.: MC 00-124-RF

WORLD OMNI FINANCIAL
CORP.,

Plaintiff,

vs.

RICHARD D. COHEN,

Defendant. /

ORDER ON PLAINTIFF'S MOTION TO TAX COSTS AND ATTORNEY'S FEES AND FINAL JUDGMENT

THIS CAUSE came before the Court for hearing on July 9, 2003 and July 28, 2003, and the Court having heard oral argument by counsel for Plaintiff, World Omni Financial Corp. ("World Omni") and Defendant, Richard Cohen ("Cohen"), testimony from Mitchel Chusid, Esquire and Cohen, expert testimony from Benjamin Bedard, Esquire and Nathan Schwartz, Esquire, having considered the Motion, Cohen's opposition to the Motion, and otherwise being duly advised in the premises,

IT IS ADJUDGED that in accordance with the Court's ruling on the record on July 28, 2003:

1. This is an extraordinary case which was hotly litigated and contested for in excess of three years, the Court file of which is 11 volumes.

2. World Omni reasonably expended approximately 506.8 hours for attorney's and paralegal services in prosecuting its action and defending Cohen's counterclaims from June 14, 2000 through June 30, 2003.

3. The hourly rates of $175.00 for Mitchel Chusid, Esquire as a senior partner; $150.00 for Allison Kay and other senior associates; and $75.00 for paralegals were more than reasonable.

4. World Omni shall recover the following amounts from Cohen: attorney's fees from June 14, 2000 through June 30, 2003 in the amount of $88,700.00; reasonable costs in the amount of $14,611.68; and $2,000.00 for expert fees for a total sum of $105,311.68.

5. Plaintiff, World Omni Financial Corp., whose address is 120 Northwest 12th Avenue, Deerfield Beach, Florida 33443, recover from Defendant, Richard D. Cohen, whose address is 21870 Cartagena Drive, Boca Raton, Florida 33428, the sum of $105,311.68 that shall bear interest at the legal rate from July 28, 2003 for which let execution issue forthwith.

6. Defendant, Richard D. Cohen shall furnish World Omni Financial Corp.'s attorney, Mitchel Chusid, Esquire, Ritter Chusid Bivona & Cohen, LLP, 7000 West Palmetto Park Road, Suite 305, Boca Raton, Florida 33433 with a Fact Information Sheet in Form 1.977 within forty-five (45) days from this date and file a Notice of Compliance with the Clerk of this Court as required by Rule 1.560.

ORDERED at West Palm Beach, Florida, on the 11th day of Aug., 2003.

/s/ Joseph Marx
COUNTY JUDGE

Copies furnished to:

Richard D. Cohen, *Pro Se*
Mitchel Chusid, Esq.

	IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA
RICHARD D. COHEN Defendant/Appellant, vs. WORLD OMNI FINANCIAL CORP., Plaintiff/Appellee.	APPELLATE DIVISION (CIVIL) Case No.: 2003 AP 001685 AY L.T. Case No. MC 00-124-RF **APPELLANT COHEN'S INITIAL BRIEF**

RICHARD D. COHEN, ESQ.
Florida Bar No. 678960
21870 Cartagena Drive
Boca Raton, Florida 33428
561-883-6227
561-883-6146 (Facsimile)

Attorney for the Appellant
Richard D. Cohen

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PRELIMINARY STATEMENT

The Appellant, Richard D. Cohen, the Defendant below, will be referred to herein as "Cohen". The Appellee, World Omni Financial Corp., the Plaintiff below, will be referred to herein as "World Omni". The following designations will be used throughout this brief: [R-] Record on Appeal with the appropriate volume and page noted; [T-] Trial Transcript with the appropriate volume and page noted.

STATEMENT OF THE CASE AND FACTS

On May 13, 1995, in Glen Head, New York, Cohen, as lessee, entered into a Closed-End Vehicle Lease Agreement with World Omni's predecessor-in-interest, as lessor, for a 1995 Land Rover Discovery for a term of 36 months with a Monthly Payment of $711.20. Concurrently therewith, the lessor's interest was assigned to World Omni. [R-I, 3-6].

Because New York Tax Law §1111 contains an acceleration feature which requires the prepayment of New York Sales Tax on the entire stream of lease payments for the entire lease term, Cohen paid $2,155.25 in New York Sales Tax upon lease inception at the rate of 8½% on the entire stream of lease payments for the entire 36 month lease term[1]. Because the New York Sales Tax was prepaid for the entire lease term, Section 3(b) of the lease accordingly provides that "Sales/Use/Lease/Other Tax" is "N[ot]/A[pplicable]" to the "Monthly Payment".

In June, 1996, Cohen relocated to Palm Beach County, Florida and notified World Omni of his change of address. Beginning in July, 1996, World Omni began invoicing Cohen for $753.87, which consisted of the $711.20 Monthly Payment reserved in the lease plus an additional $42.67 in Palm Beach County, Florida Sales/Use Tax, computed at a rate of 6%. [R-I, 107].

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[1] This amount was financed by World Omni and incorporated into the Monthly Payment. Cohen's Monthly Payment net of the New York Sales Tax would have been $651.52. The Monthly Payment reserved in the lease is $711.20, which amount includes a $59.86 component for reimbursement of the New York Sales Tax financed by World Omni ($2155.25 divided by 36 months=$59.86 per month). [R-II, 190].

Cohen disputed and refused to pay the duplicate Palm Beach County, Florida Sales/Use Tax because the New York Sales Tax had already been prepaid on all the Monthly Payments for the entire 36 month lease term. Cohen continued to pay the $711.20 Monthly Payment reserved in the lease each and every month as same became due[2] through and including the February, 1998 Monthly Payment (the lease was paid through March 12, 1998). [R-I, 108].

On February 27, 1998, World Omni repossessed the vehicle based solely upon Cohen's non-payment of 20 months (7/96-2/98) worth of disputed duplicate Florida Sales/Use Tax, and thereafter transported the vehicle to Orlando, Florida for sale. On April 8, 1998, World Omni sold the vehicle at salvage auction for the sum of $11,600.00. [R-I, 8].

In January, 2000, World Omni served Cohen with a Summons and Complaint alleging breach of lease and seeking recovery of: (i) the past due balance consisting of the disputed unpaid Florida Sales/Use Tax; and (ii) the "deficiency" between the Estimated Residual Value of the vehicle reserved in Section 8 of the lease ($21,517.42) and the $11,600.00 Sales Price. [R-I, 1-10].

In February, 2000, Cohen served World Omni with his Answer, Affirmative Defenses and Counterclaim pursuant to which Cohen admits the non-payment of the disputed

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[2] Cohen effectively prepaid most of the October, 1997 Monthly Payment by virtue of having previously overpaid each of the fifteen (15) Monthly Payments beginning in July, 1996 and continuing through September, 1997 by $42.67 each ($643.05 in the aggregate) and in October, 1997 remitted the $68.15 balance to make up the $711.20 Monthly Payment reserved in the lease. [R-I, 108].

duplicate Florida Sales/Use Tax and interposes counterclaims against World Omni for, *inter alia*, breach of contract. [R-I, 11-20].

On July 11, 2000, the lower court granted World Omni's Motion for Summary Judgment Dismissing Cohen's Counterclaims (and tacitly denied Cohen's Cross-Motion for Summary Judgment Dismissing the Complaint). [R-II, 226-227]. At the same time, the lower court entered Final Judgment Dismissing Cohen's Counterclaims. [R-II, 228].The lower court made the following findings and conclusions:

- "Payment of the New York [Sales Tax] was due at the inception of the lease on the total amount of base payments for the entire lease term"; and
- "Cohen has presented no authority to support his claim that he was entitled to credit for the payment of the New York Sales Tax which was paid . . . ".

On April 9, 2001, the lower court granted World Omni's Motion for Final Summary Judgment on the issue of liability. In it's decision, the lower court states: "the court has previously ruled [presumably referring to it's July 11, 2000 ruling] that Defendant Richard D. Cohen defaulted on the [lease] and the vehicle was repossessed in accordance with the contract and the laws of the New York and Florida". [R-III, 441-4.4.2].

On August 16, 2002, the lower court denied Cohen's Motion for Summary Judgment on World Omni's "deficiency" claim based upon the appraisal. [R-X, 1805]. Cohen had argued that Section 11 of the subject lease provides:

> "The "Realized Value" of the Vehicle is the price we[3] receive at the time of disposition of the Vehicle minus the reasonable expenses of preparation and sale of the Vehicle. For this purpose, we shall sell the vehicle at wholesale or otherwise determine it's wholesale value in a commercially reasonable manner. ***As an alternative, you may obtain (at your expense) from a qualified independent appraiser acceptable to us a written appraisal of the wholesale value of the Vehicle that could be realized at sale. This appraised value will be final and binding upon you and us."*** [*emphasis supplied*].

World Omni's repossession of the vehicle operated to deprive Cohen of the opportunity and ability to have an appraisal performed on the actual vehicle prior to its sale at auction. By letters dated March 12, 2002, and April 22, 2002, Cohen sought to obtain World Omni's consent to the selection of an appraiser. [R-X, 1733-1736]. On May 1, 2002, Cohen obtained a written appraisal of the wholesale value of the vehicle (which was based upon vehicle condition reports prepared by World Omni's own agents) from a qualified independent appraiser [R-X, 1745-1759], and since the appraised value of $21,525.00 reflected therein was higher than the $21,517.40 Estimated Residual Value reserved in the lease, there was no resulting deficiency. The appraiser was duly qualified as an expert appraiser by the lower court [T-II, 278].

On March 11, 2003, the lower court granted the prong of World Omni's motion in limine that sought to prevent

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[3] All references in the lease to "we", "our" and "us" refer to World Omni; all references to "you" and "your" refer to Cohen.

Cohen from arguing to the jury the pre-emptive and conclusive effect that the lease requires be accorded to the appraisal. The lower court ruled that:

- Cohen would be limited to having his appraiser give his opinion of the auction value of the vehicle [T-I, 18];
- "the issue in this case is not the deficiency. The issue in this case is whether the vehicle was sold in a commercially reasonable manner" [T-I, 21]; and
- "the issue is the actual sale of the vehicle. That's the issue of the case" [T-I, 22].

On June 14, 2000, World Omni served Cohen with a Demand for Judgment, pursuant to Section 768.79, *F.S.*, for $8,000.00. [R-XVIII, 3039-3040].

On March 13, 2003, the jury returned a verdict in favor of World Omni for $16,080.92 [R-XVII, 3033], upon which Final Judgment subsequently issued on July 9, 2003. [R-XIX, 3322-3323].

On August 11, 2003, after a hearing on July 9, 2003 and July 28, 2003, the lower court issued an Order on Plaintiff's Motion to Tax Costs and Attorneys Fees and a Final Judgment for $105,311.68. [R-XIX, 3326-3327]. The lower court did not give any effect to Section 13(b) of the subject lease which contractually limits Cohen's liability for World Omni's attorney's fees and disbursements incurred after default and referral to an attorney who is not World Omni's salaried employee to 15% of the amount owed by Cohen pursuant to the lease contract (or such lesser rate as may be required under applicable law). This sum amounted to $1,745.60.

SUMMARY OF ARGUMENT

This appeal requests this court to hold that the lower court erred in concluding that Cohen defaulted under the lease solely by virtue of his failure to pay Florida Sales/Use Tax on the same lease payments on which NY Sales Tax had been previously paid. It's ruling is dependent upon Cohen having *both* a statutory obligation *and* a contractual obligation to pay the Florida Sales/Use Tax. The non-existence of either a statutory obligation or a contractual obligation is fatal to World Omni's case and compels a reversal.

There is no statutory obligation for the payment of Florida Sales/Use Tax because Cohen is statutorily entitled under Section 212.06(7), *F.S.* to a credit against the Florida Sales/Use Tax otherwise payable for the NY Sales tax previously paid (at a higher rate) on the same lease payments. Absent a credit for taxes paid in other states, multiple taxation would more heavily burden vehicles transported in interstate commerce in violation of the Commerce Clause of the U.S. Constitution. *Dept of Revenue v. Kuhnlein*, 646 So.2d.717 (Fla. 1994); *Barringer v. Griffes*, 1 F.3d 1331 (2nd Cir. 1993). The lower court misconstrued the statutory framework by misapplying a limitation on a Use Tax ***exemption*** to the statutory ***credit*** provision, which resulted in an unconstitutional construction of the statute.

Cohen also did not have a contractual obligation to pay Florida Sales/Use Tax because the Section 3(b) of lease expressly disclaims any such obligation by providing that "Sales/Use/Lease/Other Tax" is "N[ot]/A[applicable]" to the Monthly Payment.

In the first alternative, the lower court erred denying Cohen's motion for summary judgment on World Omni's "deficiency" claim based upon the pre-emptive appraisal and later, in granting the prong of World Omni's motion in limine which precluded Cohen from arguing to the jury that the lease provides that the appraised value (as distinguished from the actual sales price) is conclusive and binding upon the parties.

In the second and further alternative, the lower court erred in awarding World Omni judgment for attorney's fees and costs in the sum of $105,311.68. The lease limited Cohen's liability for World Omni's attorney's fees and costs incurred after default to 15% of the amount owed on the lease contract.

STANDARD OF REVIEW

The standard of review of these judgments, which involve the interpretation of various Florida Statutes and the lease agreement, is *de novo*. "Judicial interpretation of Florida statutes is purely a legal matter and therefore subject to *de novo* review." *Operation Rescue v. Women's Health Center, Inc.*, 626 So.2d. 664, 670 (Fla. 1993). The interpretation of a contract is an issue of law and therefore also subject to *de novo* review. *Royal Oak Landing Homeowner's Ass'n Inc. v. Pelletier*, 620 So.2d. 786 (Fla. 4th DCA 1993).

ARGUMENT

I. The lower court erred in concluding that Cohen defaulted under the lease based solely upon Cohen's non-payment of Florida Sales/ Use Tax.

The lower court erred in ruling in favor of world Omni on the issue of liability unless Cohen had *both* a statutory obligation *and* a contractual obligation to pay the Florida Sales/Use Tax[4]. For the reasons that follow, Cohen had neither.

A. Cohen had no *statutory* obligation to pay Florida Sales/Use Tax on the lease payments where New York Sales Tax had been previously paid on the same lease payments.

1. Florida law requires that credit must be given for any "like tax" paid to another American jurisdiction that is equal to or greater than Florida's tax.

Cohen is entitled to a ***credit*** against the Florida Sales/Use Tax for the New York Sales Tax previously paid on the same lease payments pursuant to Section 212.06(7),F.S., which provides:

> "The provisions of this chapter [imposing Sales/ Use Tax] ***do not apply*** in respect ***to the use*** or consumption ***of tangible personal property*** or services . . . ***upon which a like tax equal to or***

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[4] If the Court finds in our favor on this issue, then all of the remaining issues are moot; otherwise these remaining issues must be addressed. Similarly, if the Court finds in our favor on Point II, then Point III is moot; otherwise Point III must be addressed.

> ***greater than the amount imposed by this chapter has been lawfully imposed or paid in another state*** . . . " [*emphasis supplied*].

The Florida Supreme Court explained the operation of this statutory credit provision as follows:

> "Florida law provides that, once the use tax is applicable, credit must be given for any "like tax" paid to another American jurisdiction that is equal to or greater than Florida's tax."

Dep't of Revenue v. Kuhnlein, 646 So.2d. 717, 723 (Fla. 1994).

Applying Section 212.06(7), F.S., to the case at bar, since the Sales/Use Tax rate in Nassau County, New York, where the original tax was paid, is 8.5%, is greater in amount than the 6% rate levied by Palm Beach County, Florida, no additional tax is due.

2. The lower court's construction of the statute violates the Commerce Clause of United States Constitution since there is a Constitutional obligation to grant a credit for Sales/Use Taxes paid to other states.

The lower court's holding that Cohen was not entitled to a credit against the Florida Sales/Use Tax otherwise payable for the New York Sales tax previously paid on the same lease payments violates the Commerce Clause of the United States Constitution. The U.S. Supreme Court described the use of sales and use tax credits in *Oklahoma Tax Commission v. Jefferson Lines, Inc.*, 514 US 175, 194 (1995) :

> "These credit provisions create a national system under which the first state of purchase or use imposes the tax. Thereafter, no other state taxes the transaction unless there has been no prior tax imposed . . . or if the tax rate of the prior taxing state is less, in which case the subsequent taxing state imposes tax measured only by the differential rate".

The *Jefferson Lines* Court made clear that the Commerce Clause requires that a tax be "internally consistent". That is, its hypothetical replication by every state must result in no greater tax burden on interstate commerce than on intrastate commerce. *Jefferson Lines*, 514 US at 185. Use taxes typically are levied on the "storage, use or other consumption" of tangible personal property in the state and are measured by the price of the property. *See, e.g.*, Section 212.06(1)(a), *F.S.* If replicated by every state, these levies would put the enterprise doing business across state lines at a competitive disadvantage to its wholly intrastate competitor.

Florida has avoided any "internal consistency" objection to their use taxes by providing for a credit for sales or use taxes paid to other states through Section 212.06(7), *F.S.* Florida thus assures that the sale or use of property or services is in principle taxed just once whether or not the property or services cross state lines.

The U.S. Supreme Court's opinion in *Jefferson Lines* reinforces the conclusion that states have a constitutional obligation to provide a credit against their own use taxes for sales or use taxes paid to other states. The Court's strong statements tying it's approval of state taxing schemes to the provision of such a credit ("equality of treatment of interstate and intrastate activity has been the common theme among the paired tax schemes that

have passed constitutional muster". *Jefferson Lines* at 193 n. 6), and expressing disapproval of state tax schemes that fail to provide for such a credit (The Court observed that it had "never upheld a tax in the face of a substantiated charge that it provided credits for the taxpayer's payment of in-state taxes, but failed to extend such a credit to out-of-state taxes" and that under Commerce Clause requirements, use tax "would not apply when another State's sales tax had previously been paid, or would apply subject to a credit for such payment". *Jefferson Lines* at 193 n. 6 and at 194.), should lay to rest any doubt that credits for use taxes are constitutionally required.

In *Barringer v. Griffes*, 1 F3d 1331 (2d. Cir. 1993), cert. denied, 510 US 1072 (1994), the Second Circuit addressed the exact same issue presented here, and invalidated, under the "internal consistency" doctrine, Vermont's denial of a credit against the use tax on motor vehicles registered in the state for sales taxes paid to another state where the vehicle was previously registered. In concluding that the denial of credit violated the Commerce Clause, the court concluded:

> "Applying the [internal consistency] test demonstrates that if all states employed Vermont's tax plan, an automobile registered in several states during its useful life would be taxed considerably more than a vehicle that spent its entire life in the same state. ***Absent a credit for taxes paid in other states, multiple taxation would heavily burden vehicles transported in interstate commerce, precisely the result the Commerce Clause was designed to prevent.***" [*emphasis supplied*]. *Id.* at 1337.

In *Kuhnlein, supra*, the Florida Supreme Court applied the U.S. Supreme Court's "internal consistency"

doctrine in striking down a statute that provided a credit against impact fees for sales or use taxes paid to Florida on the vehicle, but not to taxes paid to other states.

Applying the foregoing controlling precedents to the instant case, there can be no question that the lower court's construction of the statute in a way which denies Cohen a credit against the Florida Sales/Use Tax for the NY Sales/Use Tax previously paid on the same lease payments and which results in Cohen being subjected to a combined effective tax rate of 15.74%[5] as compared to the 6% rate imposed upon purely intrastate lessees blatantly discriminates against interstate commerce in violation of the Commerce Clause.

3. The lower court erred by misapplying a limitation on the Use Tax *exemption* provision (Subsection 8) to the statutory *credit* provision (Subsection 7).

The lower court's ruling cited the last sentence of Section 212.06(8)(a), F.S., which states "The rental or lease of tangible personal property which is used or stored in this state shall be taxable without regard to it's prior use or tax paid on purchase outside of this state".

This sentence has no application to the case at bar. Cohen's entitlement to ***credit*** arises from the NY Sales tax previously paid on the ***lease*** payments, not the "tax

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[5] This rate is calculated by adding the New York Sales Tax of $59.86 to the Florida Sales/Use Tax of $42.68 and dividing that sum ($102.54) by the Base Monthly Payment (before the addition of the NY Sales Tax component) of $651.52.

paid on the ***purchase***" of the vehicle, or from "it's prior use" outside the state.

Section 212.06(8)(a), F.S. grants a use tax ***exemption*** for property ***purchased*** outside the state by former non-residents if the property has been used outside the state for 6 months or longer. To wit, Section 212.06(8)(a), which creates this ***exemption***, provides as follows:

> "Use tax will apply and be due on tangible personal property imported or caused to be imported into this state for use, consumption, distribution, or storage to be used or consumed in this state; provided, however, that . . . ***it shall be presumed that tangible personal property used in another state,*** territory or the United States, or the District of Columbia ***for 6 months or longer before being imported into this state was not purchased for use in this state.*** The rental or ***lease*** of tangible personal property which is used or stored in this state ***shall be taxable without regard to its prior use or tax paid on purchase*** outside the state." [*emphasis supplied*].

As can be seen from the foregoing provision, the second (and last) sentence (which was cited by the lower court in support of it's decision) operates to limit the availability of the Use Tax ***exemption*** created by the first sentence (based upon the taxpayer's use of property for 6 months or longer in another tax jurisdiction) to purchased (as distinguished from leased or rented) property.

Since Cohen never sought to invoke this ***exemption***, the lower court's citation to the limitation on this ***exemption*** is wholly inapplicable.

The ***exemption*** (Subsection 8) and ***credit*** (Subsection 7) provisions are ***discrete*** provisions designed to operate

independently of one another. Obviously, if a taxpayer qualifies for the ***exemption,*** there is no need for the ***credit.*** At the same time, a limitation on the availability of the ***exemption*** does not operate to foreclose – or otherwise restrict – the availability of the ***credit*** to a taxpayer such as Cohen who does not qualify for the ***exemption*** but who qualifies for the ***credit.***

Although not expressly cited in it's decision, the lower court also apparently relied upon Technical Assistance Advisement 98A-037 ("TAA") [R-I, 160-162], issued by the Florida Department of Revenue, which was cited by World Omni in support on it's initial motion for summary judgment. The TAA, in a severely botched attempt at statutory construction, makes what can only be described as a complete ***mishmash*** of the statutory framework by taking the limitation on the ***exemption*** provision (Subsection 8) and improperly exporting it to the ***credit*** provision (Subsection 7) and in so doing, creating a completely unconstitutional result and one that the legislature surely never intended.

The lower court's conclusion that Cohen was not entitled to a credit for the NY Sales Tax previously paid on the same lease payments is simply at odds with the unambiguous language of Section 212.06(7), flies in the face of Federal Commerce Clause jurisprudence, *i.e. Barringer* and *Jefferson Lines*, and stands in direct conflict with the Florida Supreme Court's opinion in *Kuhnlein*.

Because Cohen had no statutory obligation to pay Florida Sales/Use Tax, as aforesaid, there can be no lease default predicated upon its non-payment. As a result, the lower court erred as a matter of law in granting summary judgment dismissing Cohen's counterclaims and later, in

granting summary judgment on the Complaint on the issue of liability based solely upon Cohen's nonpayment of Florida Sales/Use Tax.

B. Cohen had no *contractual* obligation to pay Florida Sales/Use Tax on the lease payments where New York Sales Tax had been previously paid on the same lease payments.

Even assuming *arguendo* that there was a statutory obligation for the payment of Florida Sales/Use Tax, the non-payment of this obligation would not constitute a lease default unless the lease itself also created an obligation for such payment. Absent such a contractual obligation, World Omni would be relegated to the statutory remedy for recovery of the unpaid taxes, *i.e.* an action at law for the unpaid taxes, but would not be entitled to the lease remedies, *i.e.* acceleration, repossession, suit for deficiency, etc., unless there was also a lease default. There is nothing in the subject lease that imposes a contractual obligation upon Cohen for the payment of Florida Sales/Use Taxes. There is, however, language in the subject lease that supports Cohen's position that there is no contractual obligation for the payment of Florida Sales/Use Tax.

1. There can be no lease default predicated upon Cohen's failure to pay Florida Sales/Use Tax where the lease expressly provides "Sales/Use/Lease/ Other Tax" is "N[ot]/A[pplicable]" to the "Monthly Payment".

Section 3(b) of the subject lease unequivocally provides that "Sales/Use/Lease/Other Tax" is "N[ot]/A[pplicable]" to

the "Monthly Payment". This is because the Nassau County, New York Sales Tax calculated at a rate of 8½% in the aggregate amount of $2155.25 was paid on the entire stream of lease payments at lease inception.

It is impossible to predicate a lease default upon the non-payment of an "obligation" that the lease itself provides is "not applicable" to the lease transaction. Because the subject lease expressly disclaims any obligation for payment of Sales/Use/Lease/Other Taxes through the use of "N/A", a lease default cannot be predicated upon its non-payment.

2. The addition of Florida Use Tax to the Base Monthly Payment that already included a provision for reimbursement of NY Sales Tax previously paid does not represent an increase in taxes but instead represents an unconstitutional pyramiding of taxes; the change from 8.5% (the NY tax rate) to 6% (the FL tax rate) represents a decrease in taxes.

The lower court's decision granting World Omni summary judgment dismissing Cohen's counterclaims correctly notes that the lease permits World Omni to change the monthly payment for increases or decreases in taxes (including use taxes). However, because use tax does "not apply when another State's sales tax had been previously paid [at an equal or greater rate]", *Jefferson Lines*, 514 US at 194, the Florida Sales/Use Tax does not apply where New York's Sales Tax has been previously paid. Accordingly, there was no increase in taxes occasioned as a result of the vehicle's move from NY to Florida. World Omni's attempted imposition of the Florida Sales/Use Tax

where the NY Sales Tax had already been paid does not represent an increase in taxes but instead represents an unconstitutional pyramiding of taxes. A true increase in taxes would only result if Florida's Sales/Use Tax rate were higher than the 8½% rate levied and paid in Nassau County, New York, which, of course, is not the case. There was instead a 2% decrease in the tax rate occasioned as a result of the vehicle's move from Nassau County, New York (8½%) to Palm Beach County, Florida (6%).

Because Cohen had no contractual obligation to pay Florida Use Tax, as aforesaid, it goes without saying that there can be no lease default predicated upon its non-payment. As a result, the lower court erred as a matter of law in granting summary judgment dismissing Cohen's counterclaims and later, in granting summary judgment on the Complaint in favor of World Omni on the issue of liability based solely upon Cohen's nonpayment of Florida Use Tax.

II. In the first alternative, the lower court erred in failing to give pre-emptive effect to the appraisal as required by the lease.

The parties agreed that in the event that Cohen obtains an appraisal, the appraised value would be given conclusive effect and that actual sales price obtained by World Omni is irrelevant.

Significantly, there is no time limitation for the exercise of Cohen's appraisal rights contained in the lease. Where a contract contains no requirement that a right be exercised by any particular time, no requirement will be implied. Even assuming without concluding that there was an implied-in-law duty on Cohen's part to perform the

appraisal within a reasonable time, the determination of reasonableness was an issue of fact for the jury, which the lower court improperly usurped. *Tendler v. Lazar*, 141 A.D.2d 717, 720 (2nd Dep't. 1988)[6].

World Omni's repossession of the vehicle, of course, operated to deprive Cohen of the opportunity and ability to have the appraisal performed on the actual vehicle prior to its sale at auction. World Omni's repossession of the vehicle cannot be used to defeat Cohen's contractual appraisal rights. It is a fundamental precept of contract law that "he who prevents a thing may not avail himself of the nonperformance (or delay in performance) which he has occasioned". *Re People by Phillips*, 250 NY 410 (1929).

As a result, the lower court erred in denying Cohen's motion for summary judgment on World Omni's "deficiency" claim based upon the pre-emptive and conclusive effect that the lease requires be accorded to the appraisal. Because the appraised value was higher than the Estimated Residual Value reserved in the lease, the appraisal operated to defeat World Omni's "deficiency" claim.

Later, in granting World Omni's motion in limine, Cohen was prevented from arguing to the jury that the appraised value (not the actual sales price) is what the parties agreed would be final and binding upon them. The lower court effectively rewrote the lease agreement in ruling that the actual sales price obtained by World Omni (not the appraised value) was all that mattered, exactly the opposite of what the parties intended and agreed.

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[6] All of the New York cases cited in this brief are controlling because Section 30 of the lease provides that New York law governs the lease.

If Cohen had been permitted to argue to the jury that the appraised value (not the actual sales price) was final and binding upon the parties, per the lease agreement, the jury would have had to conclude that there was no deficiency. As a result, the lower court's prohibition of this argument constitutes reversible error.

III. In the second and further alternative, the lower court erred in awarding World Omni costs and attorney's fees grossly in excess of the amount permitted under the lease provision contractually limiting Cohen's liability for World Omni's costs and attorney's fees to 15% of the amount owed by Cohen on the lease contract.

Section 13(b) of the lease operates to limit Cohen's liability for World Omni's attorney's fees and disbursements to 15% of the amount of World Omni's principal claim. All of the attorneys fees and disbursements which make up the lower court's award of costs and attorneys fees to World Omni fall squarely within the scope of the foregoing lease provision; that is, all of the costs and attorneys fees which comprise the lower court's award were "incurred after default and referral to an attorney who is not [World Omni's] salaried employee".

A. The basis for the recovery of attorney's fees need not arise under the contract in order to be limited by the contract.

The fact that the basis for World Omni's claim for attorney's fees arises pursuant to statute, *i.e.* Section 768.79, *F.S.* does not affect the contractual limitation. The legal landscape is filled with everyday examples of statutory

rights that are limited contractually. Some of the more common examples are: (i) waivers or limitations on the statutory right of election (in a pre- or post-nuptial agreement); and (ii) waivers or limitations on the statutory right of redemption (in a real property lease or mortgage). In each of these examples, the right itself arises under statute but the limitation on the right arises under contract. Each of these contractual limitations on the statutory rights is valid and legally enforceable. In the same vein, an express contractual limitation on World Omni's statutory right to attorney's fees and costs sought pursuant to Section 768.79. F.S., is no less valid and no less enforceable.

Since no provision of a contract should be left without force and effect, *Corhill Corp. v. S.D. Plants, Inc.*, 9 NY2d. 595 (1961), an interpretation of a contract which will make every part of it effective and which gives meaning to every provision is required. *Rentways, Inc. v. O'Neill Milk & Cream Co.*, 308 NY 342 (1955). As a corollary to this rule, a construction that renders a clause absolutely meaningless must be avoided. The lower court, in awarding World Omni attorney's fees and costs grossly in excess of the amount permitted after giving effect to the 15% limitation, construed the lease in a way that rendered the 15% limitation absolutely nugatory.

It is legally impossible to enforce the default clause (Section 13) – upon which World Omni's Complaint is based – without also enforcing the concomitant 15% limitation on attorney's fees and disbursements contained therein. The subject lease is not a "one way street"; it provides for rights and remedies but it also provides for limitations. When World Omni invokes the default clause, it invokes the default clause in its entirety and it "must

take the good (the rights and remedies conferred by the default clause) with the bad (the limitations imposed by the default clause)". World Omni cannot avail itself of the rights and remedies without also being subject to the limitations inherent therein.

B. Section 680.301, *F.S.*, governing the "Enforceability of a lease contract", statutorily pre-empts Section 768.79, *F.S.*

The apparent "conflict" between Section 768.79, F.S., and the contractual limitation on attorney's fees contained in the lease can also be resolved through simple statutory interpretation.

Section 768.71(3), F.S., which governs the applicability of Section 768.79, F.S., provides that "if a provision of this part [which includes Section 768.79] is in conflict with any other provision of the Florida Statutes, ***such other provision will apply***" [*emphasis supplied*].

Section 680.301, F.S., provides as follows:

> "**Enforceability of lease contract.** – Except as provided in this chapter, ***a lease contract is effective and enforceable according to it's terms between the parties*** [*emphasis supplied*] . . . "

Pursuant to the terms of Section 680.301, the lease contract in the case at bar, including the provision contained therein imposing the 15% limitation on the recovery of attorneys fees and costs incurred by World Omni after default by Cohen (Section 13(b)) is effective and enforceable according to it's terms between the parties.

Thus, based on the foregoing statutory provisions, to the extent that Section 768.79 is in conflict with Section

680.301, Section 768.71 provides that Section 680.301 shall apply over Section 768.79.

C. There is no Florida policy which overrides the parties ability to contract freely on the issue of attorneys fees.

In *Precision Tune Auto Care, Inc. v. Radcliffe*, 815 So.2d. 708 (Fla. 4th DCA, 2002) the Fourth District Court of Appeals held that "there is no Florida policy which would override the parties ability to contract freely on the issue of attorneys fees".

Under Florida law, "there must be some great prejudice to the dominant public interest sufficient to overthrow the fundamental policy right to freedom of contract between the parties *sui juris*". *Pizza U.S.A. of Pompano, Inc. v. R/S Assoc. of Fla.*, 655 So.2d. 237, 239 (Fla. 4th DCA, 1995) (quoting *Bituminous Casualty Corp. v. Williams*, 17 So.2d. 98, 101-02 (1944)). Since there is no public policy justification for the purpose or function of Section 768.79, F.S., *Pirelli Armstrong Tire Corp. v. Jensen*, 752 So.2d. 1275 (Fla. 2nd DCA, 2000), there is absolutely no basis for overriding the explicit contractual limitation on attorney's fees contained in the lease and the Court must give effect to the limitation.

World Omni relies upon the case of *BDO Seidman, LLP v. British Car Auctions, Inc.*, 802 So.2d. 366 (Fla. 4th DCA 2001) for the proposition that Section 768.79 applies to all civil actions no matter which states substantive law applies. The party opposing the application of Section 768.79 in that case was merely relying upon a choice of law provision in the contract which provided that Tennessee law shall apply. Here, Cohen does not rely upon the

choice of law provision; instead, Cohen relies upon a specific express contractual limitation on the amount of attorney's fees recoverable, which was not present in the *Seidman* contract. The *Seidman* Court, in distinguishing two cases involving federal statutes in which Section 768.79 was pre-empted, noted that those cases "involve policies not present when considering a choice of law issue in a case where Florida has an offer of judgment statute and Tennessee does not". *Id.* at 373. Similarly, this case involves strong public policies, *i.e.* the fundamental right of freedom to contract on the issue of attorneys fees, which are not present when simply considering a choice of law issue.

D. A contractual cap on attorney's fees should be given the same effect as a statutory cap on attorney fees.

The lease provides that Cohen's liability for World Omni's attorney's fees and costs will not "exceed 15% of the amount that you owe us (or such lesser rate as may be required under applicable law)". The lease thus contemplates both a contractual cap on attorney's fees (15%) and a statutory cap on attorney's fees (such lesser rate as may be required under applicable law). While there are no reported cases on the exact issue presented here, i.e., the interplay between Section 768.79 and a contractual cap on attorney's fees, there are several cases that hold that a statutory cap on attorney's fees trumps Section 768.79. *Pinellas Bd. Of County Comm'rs. V. Bettis*, 659 So.2d. 1365 (Fla., 2nd DCA, 1995) (holding that Section 768.25(5), which limits a county's liability for an opposing party's attorneys fees to $20,000, trumps Section 768.79); *City of Live Oak v. Harris*, 702 So.2d. 276 (Fla., 1st DCA, 1997)

(holding that Section 768.28(8), which limits a sovereign's liability for an opposing party's attorney's fees to 25% of the amount recovered, trumps Section 768.79).

Since there is no rational basis for distinguishing between a contractual cap on attorney's fees and a statutory cap, a contractual cap should be given the same force and effect as a statutory cap. This is especially so in the case at bar since Section 680.301, *F.S.*, which mandates the enforcement of a lease contract "according to it's terms between the parties", operates to give statutory effect to the contractual cap.

As a result of the foregoing, the lower court erred in awarding World Omni attorney's fees and costs in an amount that is grossly in excess of the amount permitted under the lease.

CONCLUSION

The conclusion we urge in this appeal is mandated by the unambiguous language of Section 212.06(7), *F.S.*, the lease itself, and the controlling precedents of *Jefferson Lines*, *Barringer*, and *Kuhnlein*.

If the *Court* finds that Cohen did not have ***both*** a statutory obligation ***and*** a contractual obligation to pay Florida Sales/Use Tax, the Court should: (1) reverse the lower court's grant of summary judgment dismissing Cohen's counterclaims and remand the matter to the lower court for further proceedings on the prosecution of Cohen's counterclaims with directions to enter summary judgment in favor of Cohen on the Count and Count II of the Counterclaim; (2) reverse the lower court's grant of summary judgment on the Complaint in favor of World Omni on the

issue of liability and remand the matter to the lower court with directions to dismiss World Omni's Complaint in it's entirety; and (3) reverse the lower court's judgment awarding attorneys fees and costs to World Omni and remand the matter to the lower court for the determination of Cohen's attorney's fees and costs incurred in the defense of World Omni's Complaint.

In the first alternative, the appropriate remedy for the lower court's error involving its failure to give pre-emptive and conclusive effect to the appraisal as required by the lease is a reversal of the both the judgment on the main claim and the judgment for the costs and attorneys fees and a remand to the lower court with directions to enter partial summary judgment for Cohen on World Omni's "deficiency" claim, or alternatively, ordering a new trial with directions to permit Cohen to argue to the jury that pursuant to the lease agreement, the appraised value is final and binding upon both parties.

In the second and further alternative, Cohen requests that this Court reduce the lower court's award of attorney's fees and costs to World Omni to 15% of the amount owed by Cohen to World Omni. Applying the formula and order of operations set forth in Paragraph 13(b) of the subject lease, the attorney's fees and disbursements are to be calculated before the application of interest in the clause that follows. The amount owed by Cohen to World Omni on the main judgment exclusive of and prior to the application of interest is $11,745.60.This amount multiplied by 15% yields a product of $1,745.60. The lower court's judgment awarding attorney's fees and costs to World Omni should be reduced to this amount.

Respectfully submitted,

RICHARD D. COHEN, ESQ.
Florida Bar No. 678960
21870 Cartagena Drive
Boca Raton, FL 33428
(561) 883-6227

By: /s/ Richard D. Cohen

CERTIFICATE OF COMPLIANCE

I hereby certify that Cohen's Initial Brief complies with the font requirements of Rule 9.210(a)(2) Fla.R.App.P., in that this Brief uses Courier New 12-point font.

/s/ Richard D. Cohen
RICHARD D. COHEN

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the forgoing has been furnished by First Class U.S. Mail to: Mitchel Chusid, Esq., Ritter, Chusid, et. al., 7000 W. Palmetto Park Rd., Suite 305, Boca Raton, Florida 33433, Counsel for the Appellee, on this 26th day of November, 2003.

/s/ Richard D. Cohen
RICHARD D. COHEN

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT IN AND
FOR PALM BEACH COUNTY, FLORIDA

RICHARD D. COHEN,
Appellant,

v.

WORLD OMNI FINANCIAL CORP.,
Appellee. /

APPELLATE DIVISION
(CIVIL)

CASE NO. 502003AP
01685XXCCAY

Opinion Filed: Aug. 2, 2004

Appeal from the County Court of the Fifteenth Judicial Circuit Court in and for Palm Beach County, Florida, Judge Susan Lubitz & Judge Joseph Marx.

For Appellant, Richard D. Cohen, Esq., 21870 Cartagena Drive, Boca Raton, FL 33428.

For Appellee, Mitchell Cusid, 7000 West Palmetto Park Road, Boca Raton, FL 33433.

PER CURIAM.

AFFIRMED.

MCCARTHY, CROW, & STERN, JJ., concur.

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

RICHARD D. COHEN, Defendant/Appellant,	APPELLATE DIVISION (CIVIL)
vs.	CASE NO. 2003 AP 001685 AY
WORLD OMNI FINANCIAL CORP., Plaintiff/Appellee.	L.T. Case No. MC 00-124-RF

APPELLANT'S MOTION FOR REHEARING – REQUEST FOR A WRITTEN OPINION

Appellant, RICHARD D. COHEN, by and through the undersigned counsel, moves the Court pursuant to Appellate Rules 9.330(a) for Rehearing – Request for a Written Opinion, and as grounds therefor, states as follows:

1. On August 2, 2004, this Court issued a Per Curiam Affirmance ("PCA") (Exhibit "A"), affirming, *inter alia*, the lower court's constitutionally impossible construction of Section 212.06(7), *F.S.* ("statutory credit provision").

2. It is respectfully submitted that this Court, in issuing the PCA, must have overlooked and/or misapprehended controlling precedents from both the U.S. Supreme Court and the Florida Supreme Court that mandate a reversal of the lower court's holding that Appellant was not entitled to credit against the Florida Sales/Use Tax for the New York Sales Tax previously paid on the entire stream of lease payments for the entire lease term.

3. This case is not appropriate for a PCA since it does not fall into any of the categories for which PCA's are appropriate. *Horn v. Marine Hospitality Corp.*, 745 So.2d.

329 (Fla. 4th DCA 1998). In that case, the Court held that PCA's are only appropriate where: (1) an opinion would serve no useful purpose; (2) the appellant is unable to establish error because of the lack of a transcript; (3) the appellant has failed to preserve error by making an objection in the trial court; and (4) the litigants are unable to identify any specific error made by the trial court "but are simply unhappy with the result".

4. Conversely, this case is clearly appropriate for a written opinion since it was extensively briefed, presents an issue of a constitutional dimension and widespread public importance (the tax collection practices at issue in this case are not isolated to this case but, based upon anecdotal evidence, are institutionalized throughout the auto leasing industry) and otherwise qualifies in several respects under the guidelines for opinion writing published by the Judicial Management Council Committee of Per Curiam Affirmed Decisions (Exhibit "B").

5. I express a belief, based upon a reasoned and studied professional judgment that a written opinion will provide a legitimate basis for District Court of Appeal review because, without limitation:

> (a) the lower court's holding that Appellant was not entitled to a credit against the Florida Sales/Use Tax otherwise payable for the New York Sales Tax previously paid on the entire stream of lease payments for the entire lease term and thus defaulted under the lease is completely contrary to the Florida Supreme Court's decision in *Dep't. of Revenue v. Kuhnlein*, 646 So.2d. 717, 723 (Fla. 1994) holding that "Florida law provides that once use tax is applicable, credit must be given for any like tax paid to another American jurisdiction";

(b) the lower court's holding that Appellant was not entitled to a credit against the Florida Sales/Use Tax otherwise payable for the New York Sales Tax previously paid on the entire stream of lease payments for the entire lease term and thus defaulted under the lease is incompatible with U.S. Supreme Court jurisprudence holding that under Commerce Clause requirements, "use tax would not apply where another state's sales tax had previously been paid or would apply subject to a credit for such payment". *Oklahoma Tax Commission v. Jefferson Lines, Inc.*, 514 US 175, 194 (1995).

WHEREFORE, Appellant, RICHARD D. COHEN, respectfully requests a written opinion.

Respectfully Submitted,

RICHARD D. COHEN, ESQ.
Florida Bar No. 678960
21870 Cartagena Drive
Boca Raton, FL 33428
561-883-6227
561-883-6146 (Facsimile)

By: /s/ Richard D. Cohen

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished by First Class U.S. Mail to: Mitchel Chusid, Esq., Ritter, Chusid, et al., 7000 W. Palmetto Park Rd., Suite 305, Boca Raton, Florida 33433, Counsel for the Appellee, on this 9th day of August, 2004.

/s/ Richard D. Cohen
RICHARD D. COHEN

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOURTH DISTRICT

RICHARD D. COHEN, Petitioner, vs. WORLD OMNI FINANCIAL CORP., Respondent	4DCA Case No.: Circuit Court Case No.: 2003 AP 001685 AY County Court Case No.: MC 00-124-RF **PETITION FOR WRIT OF CERTIORARI**

Pursuant to rule 9.100(c), Petitioner, Richard D. Cohen ("Cohen"), petitions this court for a writ of certiorari to reverse the appellate decision of the Circuit Court affirming *Per Curiam* the two final judgments of the County Court against Cohen appealed from. The failure of the Circuit Court to adhere to binding Florida Supreme Court and U.S. Supreme Court precedents justifies subsequent review by certiorari in the District Court of Appeal.

BASIS FOR INVOKING JURISDICTION

Article V section 4(b) of the Florida Constitution provides that the district courts of appeal have jurisdiction to issue writs of certiorari. See also Fla.R.App.P. 9.030(b)(2)(B). Certiorari jurisdiction extends to review of a judgment of a circuit court sitting in its appellate capacity when a circuit court fails to afford procedural due process or departs from the essential requirements of law by failing to apply the correct law. See *Ivey v. Allstate Ins. Co.*, 744 So.2d. 679, 682 (Fla. 2000); See also *Martin County v. City of Stuart,* 756 So.2d. 1264, 1265 (Fla. 4th DCA 1999). Certiorari jurisdiction should be exercised in this case since the circuit court failed to follow binding

precedents from both the United States Supreme Court and the Florida Supreme Court. See *Oklahoma Tax Commission v. Jefferson Lines, Inc.*, 514 U.S. 175, 194 (1995) (under Commerce Clause requirements, use tax "would not apply when another state's sales tax had previously been paid or would apply subject to a credit for such payment"); *Dept. of Revenue v. Kuhnlein,* 646 So.2d. 717, 723 (Fla. 1994) ("Florida law [Section 212.06(7)] provides that, once the use tax is applicable, credit ***must*** be given for any "like tax" paid to another American jurisdiction that is equal to or greater than Florida's tax"). This court should exercise its certiorari jurisdiction and review the circuit court decision since it failed to apply these settled precedents but, instead, affirmed the County Court decision that relied upon an inapplicable statute, *i.e.*, Section 212.06(8). The appellate decision to be reviewed in the present case was rendered on August 2, 2004. Cohen's motion for rehearing (request for a written opinion) was denied on August 31, 2004. This petition is timely under rule 9.100(c)(1).

STATEMENT OF CASE AND FACTS

On May 13, 1995, in Glen Head, New York, Cohen, as lessee, entered into a Closed-End Vehicle Lease Agreement with World Omni's predecessor-in-interest, as lessor, for a 1995 Land Rover Discovery for a term of 36 months with a Monthly Payment of $711.20. Concurrently therewith, the lessor's interest was assigned to World Omni. [App. 1].

Because New York Tax Law §1111 contains an acceleration feature which requires the prepayment of New York Sales Tax on the entire stream of lease payments for the entire lease term, Cohen paid $2,155.25 in New York

Sales Tax upon lease inception at the rate of 8 ½% on the entire stream of lease payments for the entire 36 month lease term. Because the New York Sales Tax was prepaid for the entire lease term, Section 3(b) of the lease accordingly provides that "Sales/Use/Lease/Other Tax" is "N[ot]/A[pplicable]" to the "Monthly Payment".

Approximately a year later, in June, 1996, Cohen relocated to Palm Beach County, Florida and notified World Omni of his change of address. Beginning in July, 1996, World Omni began invoicing Cohen for $753.87, which consisted of the $711.20 Monthly Payment reserved in the lease plus an additional $42.67 in Palm Beach County, Florida Sales/Use Tax, computed at a rate of 6%. [App. 2]. The 6% Florida Sales/Use Tax, when combined with the 8 ½% NY Sales/Use Tax previously paid, would result in a cumulative, compound tax burden to Cohen of 15.74%[1].

Cohen disputed and refused to pay the duplicate Palm Beach County, Florida Sales/Use Tax because the New York Sales Tax had already been prepaid on all the Monthly Payments for the entire 36 month lease term, Cohen continued to pay the $711.20 Monthly Payment reserved in the lease each and every month as same became due through and including the February, 1998 Monthly Payment (the lease was paid through March 12, 1998). [App. 2].

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[1] This rate is calculated by adding the New York Sales Tax of $59.86 to the Florida Sales/Use Tax of $42.68 and dividing that sum ($102.54) by the Base Monthly Payment (before the addition of the NY Sales Tax component) of $651.52.

On February 27, 1998, World Omni declared the lease in default and repossessed the vehicle based solely upon Cohen's non-payment of 20 months (7/96-2/98) worth of disputed duplicate Florida Sales/Use Tax. On April 8, 1998, World Omni sold the vehicle at salvage auction for the sum of $11,600.00. [App. 3].

In January, 2000, World Omni served Cohen with a County Court Summons and Complaint alleging breach of lease and seeking recovery of: (i) the past due balance consisting of the disputed unpaid Florida Sales/Use Tax; and (ii) the "deficiency" between the Estimated Residual Value of the vehicle reserved in Section 8 of the lease ($21,517.42) and the $11,600.00 Sales Price. [App. 3].

In February, 2000, Cohen served World Omni with his Answer, Affirmative Defenses and Counterclaim pursuant to which Cohen admits the non-payment of the disputed duplicate Florida Sales/Use Tax and interposes counterclaims against World Omni for, *inter alia*, breach of contract. [App. 4].

On July 11, 2000, the County Court granted World Omni's Motion for Summary Judgment Dismissing Cohen's Counterclaims (and tacitly denied Cohen's Cross-Motion for Summary Judgment Dismissing the Complaint). [App. 2 and 5]. At the same time, the County Court entered Final Judgment Dismissing Cohen's Counterclaims. [App. 6]. The County Court made the following findings and conclusions:

- "Payment of the New York [Sales Tax] was due at the inception of the lease on the total amount of base payments for the entire lease term"; and

- "Cohen has presented no authority to support his claim that he was entitled to credit for the payment of the New York Sales Tax which was paid . . . ".

On April 9, 2001, the County Court granted World Omni's Motion for Final Summary Judgment on the issue of liability. In its decision, the County Court states: "the court has previously ruled [presumably referring to it's July 11, 2000 ruling] that Defendant Richard D. Cohen defaulted on the [lease] and the vehicle was repossessed in accordance with the contract and the laws of the New York and Florida". [App. 7 and 8].

On June 14, 2000, World Omni served Cohen with a Demand for Judgment, pursuant to Section 768.79, *F.S.*, for $8,000.00. [App. 9].

On March 13, 2003, the jury returned a verdict in favor of World Omni for $16,080.92, upon which Final Judgment subsequently issued on July 9, 2003. [App. 10].

On August 11, 2003, after a hearing on July 9, 2003 and July 28, 2003, the County Court issued an Order on Plaintiff's Motion to Tax Costs and Attorneys Fees and a Final Judgment for $105,311.68. [App. 11]. The County Court did not give any effect to Section 13(b) of the subject lease which contractually limits Cohen's liability for World Omni's attorney's fees and disbursements incurred after default and referral to an attorney who is not World Omni's salaried employee to 15% of the amount owed by Cohen pursuant to the lease contract (or such lesser rate as may be required under applicable law). This sum amounted to $1,745.60.

On August 19, 2003, Cohen filed a Notice of Appeal from the two County Court judgments. [App. 12]. Cohen

filed his initial brief on November 26, 2003 [App. 13]. World Omni filed their answer brief on January 19, 2004 [App. 14]. Cohen filed his reply brief on March 2, 2004. [App. 15]. On August 2, 2004, after oral argument, the Circuit Court, acting in its appellate capacity, affirmed *Per Curiam*. [App. 16]. On August 31, 2004, the Circuit Court denied Cohen's motion for rehearing (request for written opinion) [App. 17]. On September 17, 2004, the Circuit Court issued an order granting World Omni's Renewed Motion for Appellate Costs and Fees [App. 18].

NATURE OF RELIEF SOUGHT

The nature of the relief sought by this petition is a writ of certiorari: (1) reversing the decision of the Circuit Court affirming *Per Curiam* the judgments of the County Court; (2) reversing the County Court's grant of summary judgment dismissing Cohen's counterclaims and remand the matter to the County Court for further proceedings on the prosecution of Cohen's counterclaims with directions to enter summary judgment in favor of Cohen on Count I and II of the Counterclaim; (3) reversing the County Court's grant of summary judgment on the Complaint in favor of World Omni on the issue of liability and remand the matter to the County Court with directions to dismiss World Omni's Complaint in its entirety; (4) reversing the County Court's judgment awarding attorneys fees and costs to World Omni and remand the matter back to the County Court for the determination of Cohen's attorney's fees and costs incurred in the defense of World Omni's Complaint; and (5) quashing the Order of Circuit Court granting World Omni's Renewed Motion for Appellate Costs and Fees.

ARGUMENT

I. The Circuit Court, by failing to follow binding precedents from both the Florida Supreme Court and the U.S. Supreme Court, departed from essential requirements of law in rendering its decision on appeal.

A limited opportunity exists to review an appellate decision of the circuit court by filing a petition for a writ of certiorari in the district court of appeal. Review by certiorari is permitted in the district court of appeal in those instances in which it can be shown that the circuit court departed from the essential requirements of law in rendering its decision on appeal. *Combs v. State,* 436 So.2d. 93 (Fla. 1983). The failure of a circuit court to adhere to a binding precedent of a district court of appeal can be grounds for review by certiorari in the district court of appeal. *Auto Owners Ins. Co. v. Marzulli,* 788 So.2d. 1031 (Fla. 2d DCA 2001). *A fortiori,* the failure of a circuit court to follow binding precedents of the Florida Supreme Court and the U.S. Supreme Court is grounds for review by certiorari in the district court of appeal.

The dispositive issue in this case is whether Cohen defaulted under the lease by not paying Florida Sales/Use Tax where NY Sales/Use Tax had previously been paid on the entire stream on lease payments for the entire lease term. The Circuit Court's affirmance of County Court's holding that Cohen was not entitled to a credit for the NY Sales/Use Tax previously paid and thus defaulted under the lease should be reversed for three reasons. First, it is incompatible with the Florida Supreme Court's decision in *Dep't. of Revenue v. Kuhnlein,* 646 So.2d. 717, 723 (Fla. 1994) which holds that "Florida law [Section 212.06(7)] provides that, once the use tax is applicable, credit **must**

be given for any "like tax" paid to another American jurisdiction that is equal to or greater than Florida's tax". Second, but at least as important, the County Court's holding is incompatible with U.S. Supreme Court jurisprudence holding that under Commerce Clause requirements, use tax "would not apply when another state's sales tax had previously been paid or would apply subject to a credit for such payment". *Oklahoma Tax Commission v. Jefferson Lines, Inc.*, 514 US 175, 194 (1995). Third, even if there were a statutory obligation for the Florida Tax (which, of course, there isn't), because the lease specifically and expressly provides that Sales/Use Tax is not applicable to the ongoing Monthly Payment, there is no contractual obligation and thus no basis for a lease default.

In order to find that Cohen defaulted under the lease by failing to pay the Florida Sales/Use Tax, Cohen had to have had *both* a statutory obligation *and* a contractual obligation to pay the Florida Sales/Use Tax. For the reasons that follow, Cohen had neither.

A. Cohen had no *statutory* obligation to pay Florida Sales/Use Tax on the lease payments where New York Sales Tax had been previously paid on the same lease payments.

1. Florida law requires that credit must be given for any "like tax" paid to another American jurisdiction that is equal to or greater than Florida's tax.

Cohen is entitled to a ***credit*** against the Florida Sales/Use Tax for the New York Sales Tax previously paid on the same lease payments pursuant to Section 212.06(7),

F.S. (hereinafter the "Statutory Credit Provision"), which provides:

> "The provisions of this chapter [imposing Sales/Use Tax] ***do not apply*** in respect ***to the use*** or consumption ***of tangible personal property*** or services . . . ***upon which a like tax equal, to or greater than the amount imposed by this chapter has been lawfully imposed or paid in another state*** . . . " [*emphasis supplied*].

The Florida Supreme Court explained the operation of this Statutory Credit Provision as follows:

> "Florida law provides that, once the use tax is applicable, credit **must** be given for any "like tax" paid to another American jurisdiction that is equal to or greater than Florida's tax."

Dep't of Revenue v. Kuhnlein, 646 So.2d. 717, 723 (Fla. 1994).

This Statutory Credit Provision is generic in nature, unqualified in scope, unexceptionable in its terms, and completely agnostic as to the type of transaction in which the original tax was paid. More to the point, there is no exception for leased property, nor could there be; under Commerce Clause requirements (more on that in a minute), the Statutory Credit Provision must apply regardless of whether the transaction is a cash sale, credit sale, installments sale, lease or some other type of transaction. So long as a "like tax" is paid to another American jurisdiction, credit **must** be given for such payment.

The Circuit Court's affirmance of the County Court's holding that Cohen was not entitled to a credit for the NY Sales/Use Tax previously paid on the same lease payments is completely contrary to the unexceptionable terms of the

Statutory Credit Provision, as construed by the Florida Supreme Court in *Kuhnlein*.

2. Under Commerce Clause requirements, as construed and promulgated by the U.S. Supreme Court, use tax would not apply when another state's sales tax had previously been paid or would apply subject to a credit for such payment.

It is a fundamental rule of statutory construction that when two interpretations of a statute are possible (Cohen assumes, for the sake of this argument, but does not concede that two interpretations the Statutory Credit Provision are possible), and one of them would lead to the statute being held unconstitutional, the court should chose the interpretation that would be constitutional. *King v. St. Vincent's Hospital*, 502 U.S. 215, 221 fn. 9 (1991). The presumption is that the legislature intended to enact a statute that would be valid, not one that would be held unconstitutional. If one interpretation even raises a question of constitutional law, the favored approach is to choose another interpretation, thereby avoiding the constitutional question. *Solid Waste Authority of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172-173 (2001). The presumption is that the legislature would not have intended to pass an act of even questionable constitutionality. Constitutionally doubtful statutory constructions must be avoided. *DeBartolo Corp. v. Florida Gulf Coast Trades Council*, 485 U.S. 568 575 (1988).

The County Court's holding (and the Circuit Court's affirmance thereof) that Cohen was not entitled to a credit against the Florida Sales/Use Tax otherwise payable for

the New York Sales tax previously paid on the same lease payments results in a statutory interpretation which violates the Commerce Clause of the United States Constitution. The U.S. Supreme Court described the pattern of sales and use tax credits in *Oklahoma Tax Commission v. Jefferson Lines, Inc.*, 514 US 175, 194 (1995):

> "These credit provisions create a national system under which the first state of purchase or use imposes the tax. Thereafter, no other state taxes the transaction unless there has been no prior tax imposed . . . or if the tax rate of the prior taxing state is less, in which case the subsequent taxing state imposes tax measured only by the differential rate".

Under Commerce Clause requirements, a state tax must not discriminate against interstate commerce. "Discrimination exists when a state law taxes a transaction more heavily when it crosses state lines than when it occurs entirely within the state". *Kuhnlein* at 722 (quoting *Oregon Waste Systems, Inc. v. Department of Environmental Qaulity,* 511 US 93 (1994)). The *Jefferson Lines* Court made clear that the Commerce Clause requires that a tax be "internally consistent". To be internally consistent, a tax must impose no greater tax burden on interstate commerce than on intrastate commerce. *Jefferson Lines,* 514 US at 185. If the tax burden is greater on interstate commerce, the tax fails the internal consistency test and thus violates the Commerce Clause.

Absent a credit for taxes previously paid to other states, use taxes are inherently discriminatory and fail the internal consistency test; the interstate user of property is subject to multiple exactions whereas the intrastate user of the same property pays but a single tax. This case furnishes the perfect illustration; Cohen, as an interstate

lessee, is being subjected to a cumulative, compound tax burden of 15.74%, as compared to the wholly intrastate Florida lessee who pays but a single 6% tax. The discrimination against interstate commerce is self-evident.

To avoid an internal consistency problem, the Statutory Credit Provision [Section 212.06(7), *F.S.*] is designed to equalize the tax burden between interstate and intrastate activity by assuring that the sale and use of the property is in principle taxed just once regardless of whether or not the property crosses state lines. The reason that the Statutory Credit Provision is unexceptionable in its terms is because the internal consistency doctrine that constitutionally underpins the Statutory Credit Provision is absolute and indivisible in its application. The internal consistency doctrine does not discriminate among transaction types (*e.g., sale, lease, etc.*) in determining whether a state tax discriminates against interstate commerce.

The U.S. Supreme Court's opinion in *Jefferson Lines* reinforces the conclusion that states have a constitutional obligation to provide a credit against their own use taxes for sales or use taxes paid to other states. The Court's strong statements tying it's approval of state taxing schemes to the provision of such a credit ("equality of treatment of interstate and intrastate activity has been the common theme among the paired tax schemes that have passed constitutional muster". *Jefferson Lines* at 193 n. 6), and expressing disapproval of state tax schemes that fail to provide for such a credit (The Court observed that it had "never upheld a tax in the face of a substantiated charge that it provided credits for the taxpayer's payment of in-state taxes, but failed to extend such a credit to out-of-state taxes" and that under Commerce Clause requirements, use tax "would not apply when another State's

sales tax had previously been paid, or would apply subject to a credit for such payment". *Jefferson Lines* at 193 n. 6 and at 194.), should lay to rest any doubt that credits for use taxes are constitutionally required.

In *Barringer v. Griffes*, 1 F3d 1331 (2d. Cir. 1993), cert. denied, 510 US 1072 (1994), the Second Circuit addressed the exact same issue presented here, and invalidated, under the "internal consistency" doctrine, Vermont's denial of a credit against the use tax on motor vehicles registered in the state for sales taxes paid to another state where the vehicle was previously registered. In concluding that the denial of credit violated the Commerce Clause, the court concluded:

> "Applying the [internal consistency] test demonstrates that if all states employed Vermont's tax plan, an automobile registered in several states during its useful life would be taxed considerably more than a vehicle that spent its entire life in the same state. ***Absent a credit for taxes paid in other states, multiple taxation would heavily burden vehicles transported in interstate commerce, precisely the result the Commerce Clause was designed to prevent.***" [*emphasis supplied*]. *Id.* at 1337.

The only "difference" between *Barringer* and this case is that the Vermont statute in *Barringer* was facially unconstitutional (in that it did not, on its face, contain a statutory credit provision as constitutionally required) whereas in this case, the County Court took the perfectly constitutional Florida statute (because it contained a statutory credit provision) but construed and applied it in an unconstitutional manner (by ignoring and/or not giving effect to the Statutory Credit Provision thereby denying Cohen credit for the sales tax previously paid). Unconstitutional is

unconstitutional; the effect of a statute unconstitutionally construed and applied is no different – and no less odious – than the effect of a statute that is unconstitutional on its face.

In *Kuhnlein, supra,* the Florida Supreme Court adopted and applied the U.S. Supreme Court's "internal consistency" doctrine in striking down a statute that provided a credit against impact fees for sales or use taxes paid to Florida on the vehicle, but not to taxes paid to other states.

Applying the foregoing controlling precedents to the instant case, there can be no question that the County Court's construction of the statute in a way which denies Cohen a credit against the Florida Sales/Use Tax for the NY Sales/Use Tax that had previously been paid on the same lease payments and which results in Cohen, as an interstate lessee, being subjected to a cumulative compound tax burden of 15.74%, as compared to the 6% rate imposed upon purely intrastate Florida lessees, blatantly discriminates against interstate commerce in violation of the Commerce Clause.

3. The County Court misapplied the exception for leased property contained in the Use Tax *Exemption* (Subsection 8) to the *Statutory Credit Provision* (Subsection 7).

The County Court's ruling cited the last sentence of Section 212.06(8)(a), *F.S.*, which states "The rental or lease of tangible personal property which is used or stored in this state shall be taxable without regard to it's prior use or tax paid on purchase outside of this state".

This sentence has no application to the case at bar. Cohen's entitlement to ***credit*** arises from the NY Sales tax previously paid on the ***lease*** payments, not the "tax paid on the ***purchase***" of the vehicle, or from "it's prior use" outside the state.

Section 212.06(8)(a), *F.S.* (hereinafter the "Exemption") grants a use tax ***exemption*** for property ***purchased*** outside the state by former non-residents if the property has been used outside the state for 6 months or longer. To wit, Section 212.06(8)(a), which creates this ***Exemption***, provides as follows:

> "Use tax will apply and be due on tangible personal property imported or caused to be imported into this state for use, consumption, distribution, or storage to be used or consumed in this state; provided, however, that . . . ***it shall be presumed that tangible personal property used in another state,*** territory or the United States, or the District of Columbia ***for 6 months or longer before being imported into this state was not purchased for use in this state.*** The rental or ***lease*** of tangible personal property which is used or stored in this state ***shall be taxable without regard to its prior use or tax paid on purchase*** outside the state." [*emphasis supplied*].

As can be seen from the foregoing provision, the second (and last) sentence (which was cited by the County Court in support of its decision) operates to limit the availability of the Use Tax ***Exemption*** created by the first sentence (based upon a taxpayer's use of property for 6 months or longer in another tax jurisdiction) to purchased (as distinguished from leased or rented) property. Stated differently, the ***Exemption*** contains an exception for leased property.

Because the ***Exemption*** is limited to purchased property, Cohen never sought to invoke this ***Exemption***. This ***Exemption*** has absolutely nothing to do with Cohen or with this case.

In *Kuhnlein*, the Florida Supreme Court explained that "use tax involves ***two*** special problems of a constitutional dimension which states like Florida have attempted to resolve through use tax exemptions". *Kuhnlein* at 722. The *Kuhnlein* Court goes on to describe in separate fashion each of: (1) the ***Exemption*** based on prior use outside the state for 6 months or longer (§212.06(8), *F.S.*); and (2) the ***Statutory Credit Provision*** based upon prior payment of sales tax to another American jurisdiction (§212.06(7), *F.S.*).The *Kuhnlein* Court makes clear that the ***Exemption*** (Subsection 8) and ***Statutory Credit Provision*** (Subsection 7) are ***discrete*** provisions designed to operate ***independently*** of one another. Obviously, if a taxpayer qualifies for the ***Exemption***, (s)he is exempt from the tax and there is no need for resort to the ***Statutory Credit Provision.*** At the same time, a limitation on the availability of the ***Exemption*** does not operate to foreclose – or otherwise restrict – the availability of the ***Statutory Credit Provision*** to a taxpayer such as Cohen who does not qualify for the ***Exemption*** but who qualifies for the ***Statutory Credit Provision***.

The ***Exemption*** exists as a matter of legislative prerogative (for administrative convenience) and, unlike the ***Statutory Credit Provision***, not as a matter of constitutional imperative. Unlike the unexceptionable ***Statutory Credit Provision***, the ***Exemption*** contains an exception for leased property. The County Court plucked this exception for leased property from the ***Exemption*** and willy-nilly transplanted it into the unexceptionable

Statutory Credit Provision, thereby unconstitutionally limiting the constitutionally required scope of the ***Statutory Credit Provision***.

As a much lesser matter of statutory construction, the presence of the exception for leased property in the ***Exemption*** and its absence from the ***Statutory Credit Provision*** argues against reading it as implied where it has been omitted. See *Frank J. Rooney, Inc. v. Leisure Resorts, Inc.*, 624 So.2d. 773, 777 (Fla. 4th DCA 1993).

Moreover, the parallel provisions of the ***Statutory Credit Provision*** and the ***Exemption*** contained in the Florida Administrative Code, *i.e.*, Section 12A-1.091, make absolutely vivid the fact that the exception for leased property only applies to the ***Exemption***, and not to the ***Statutory Credit Provision***.

Although not expressly cited in its decision, the County Court apparently relied upon Technical Assistance Advisement 98A-037 ("TAA") [App. 2], issued by the Florida Department of Revenue, which was cited by World Omni in support on its initial motion for summary judgment. The TAA, in a severely botched attempt at statutory construction, makes what can only be described as a complete ***mishmash*** of the statutory framework by taking the exception for leased property contained in the ***Exemption*** (Subsection 8) and improperly exporting it into the ***Statutory Credit Provision*** (Subsection 7) and in so doing, creating a completely unconstitutional result and one that the legislature surely never intended. The TAA does not address – and is apparently completely oblivious to – the controlling Commerce Clause requirements. The TAA, according to the statute that governs its issuance (Section 213.22, *F.S.*), has "no precedential value", and

according to its own terms, is "binding on the department [of revenue] only". Most importantly, the statutory interpretation in the TAA is completely incompatible with settled decisional authority from the highest courts in both this state and this nation.

The County Court's holding that Cohen was not entitled to a credit for the NY Sales Tax previously paid on the same lease payments is simply at odds with the unambiguous language of the Statutory Credit Provision, flies in the face of Federal Commerce Clause jurisprudence, *i.e. Barringer* and *Jefferson Lines*, and stands in direct conflict with the Florida Supreme Court's opinion in *Kuhnlein*.

Because Cohen had no statutory obligation to pay Florida Sales/Use Tax, there can be no lease default predicated upon its non-payment. As a result, the County Court failed to follow binding precedents from both the Florida and U.S. Supreme Courts in granting summary judgment dismissing Cohen's counterclaims and later, in granting summary judgment on the Complaint on the issue of liability based solely upon Cohen's nonpayment of Florida Sales/Use Tax.

B. Cohen had no *contractual* obligation to pay Florida Sales/Use Tax on the lease payments where New York Sales Tax had been previously paid on the same lease payments.

Even assuming *arguendo* that there was a statutory obligation for the payment of Florida Sales/Use Tax (which, of course, there isn't), the non-payment of this obligation would not constitute a lease default unless the

lease itself also created an obligation for such payment. Absent such a contractual obligation, World Omni would be relegated to the statutory remedy for recovery of the unpaid taxes, *i.e.* an action at law for the unpaid taxes, but would not be entitled to the lease remedies, *i.e.* acceleration, repossession, suit for deficiency, etc., unless there was also a lease default. There is nothing in the subject lease that imposes a contractual obligation upon Cohen for the payment of Florida Sales/Use Taxes. To the contrary, because sales tax was paid at lease inception on the entire stream of lease payments for the entire lease term, the lease expressly disclaims a contractual obligation for the payment of Sales/Use Tax.

1. There can be no lease default predicated upon Cohen's failure to pay Florida Sales/Use Tax where the lease expressly provides "Sales/Use/Lease/Other Tax" is "N[ot]/A[pplicable]" to the "Monthly Payment".

Section 3(b) of the subject lease unequivocally provides that "Sales/Use/Lease/Other Tax" is "N[ot]/A[pplicable]" to the ongoing "Monthly Payment". This is because the Nassau County, New York Sales Tax calculated at a rate of 8½% in the aggregate amount of $2155.25 was paid on the entire stream of lease payments at lease inception.

It is impossible to predicate a lease default upon the non-payment of an "obligation" that the lease itself provides is "not applicable" to the lease transaction. Because the subject lease expressly disclaims any obligation for payment of Sales/Use/Lease/Other Taxes through the use of "N/A", a lease default cannot be predicated upon its non-payment.

2. The addition of Florida Use Tax to the Base Monthly Payment that already included a provision for reimbursement of NY Sales Tax previously paid does not represent an increase in taxes but instead represents an unconstitutional pyramiding of taxes; the change from 8.5% (the NY tax rate) to 6% (the FL tax rate) represents a decrease in taxes.

The County Court's decision granting World Omni summary judgment dismissing Cohen's counterclaims correctly notes that the lease permits World Omni to change the monthly payment for increases or decreases in taxes (including use taxes). However, because use tax does "not apply when another state's sales tax had previously been paid, or would apply subject to a credit for such payment", *Jefferson Lines*, 514 US at 194, the Florida Sales/Use Tax does not apply where New York's Sales Tax had previously been paid. Accordingly, there was no increase in taxes occasioned as a result of the vehicle's move from NY to Florida. World Omni's attempted imposition of the Florida Sales/Use Tax where the NY Sales Tax had already been paid does not represent an increase in taxes but instead represents an unconstitutional pyramiding of taxes. A true increase in taxes would only result if Florida's Sales/Use Tax rate were higher than the 8½% rate levied and paid in Nassau County, New York, which, of course, is not the case. Instead, there was a 2½% decrease in the tax rate occasioned as a result of the vehicle's move from Nassau County, New York (8½%) to Palm Beach County, Florida (6%).

3. Even assuming without conceding that there is a contract ambiguity in the lease, under controlling New York[2] law, that ambiguity must be resolved in favor of Cohen.

Purely as a matter of contract construction (putting aside the absence of a statutory obligation for the tax), the County Court failed to adhere to controlling New York precedents in granting summary judgment in favor of World Omni in the face of a contract ambiguity that should have been resolved in favor of Cohen. There is a ***conflict*** between ***Section 3(b)*** of the lease (which was ***drafted by World Omni***) which has a ***typewritten*** insertion in a ***12 pt. font*** size ***specifically*** providing that "Sales/Use/Lease/Other Tax" is "N[ot]/A[pplicable]" to the "Monthly Payment", on the one hand, and ***Section 26 generally*** entitled "License, Registration, Taxes, and Inspection" which is ***preprinted*** boilerplate in a ***6 pt. font*** size ***generally*** providing, *inter alia,* that "[l]essor may change your Monthly Payment for increases or decreases in taxes", on the other. Since these two clauses of the agreement are totally repugnant to each other, ***the first of such clauses in the contract shall be received*** and the subsequent one rejected. *Honigsbaum's, Inc. v. Stuyvesant Plaza, Inc.*, 178 AD2d. 702 (1991 3rd Dept.). An agreement must be construed so as to ***avoid rendering a specific clause meaningless in an attempt to give a general clause certain meaning.*** *Kahn v. New York Times,* 122 AD2d. 655 (1986 1st Dept.). ***A typewritten clause overrides a conflicting preprinted clause*** of a contract.

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[2] Section 30 of the lease provides that New York law will govern the lease.

Ebbecke v. Bay View Environmental Services, Inc., 145 AD2d. 524 (1988 2nd Dept.). Since this agreement is, at best, susceptible to two reasonable interpretations, it is ambiguous, and ***must be construed against World Omni who drafted it.*** *Diodato v. Eastchester Dev. Corp.*, 111 AD2d. 303 (1985 2nd Dept.). Applying each of the foregoing maxims of contract construction to the case at bar, World Omni's motions for summary judgment should have been denied.

Because Cohen had no contractual obligation to pay Florida Use Tax, there can be no lease default predicated upon its non-payment. As a result, the County Court failed to follow controlling New York precedents in granting summary judgment dismissing Cohen's counterclaims and later, in granting summary judgment on the Complaint in favor of World Omni on the issue of liability based solely upon Cohen's nonpayment of Florida Use Tax (the Circuit Court also failed to follow these controlling precedents in affirming the County Court's decision).

CONCLUSION

Accordingly, a writ of certiorari should issue for the relief set forth in the Nature of Relief section hereinabove.

Respectfully submitted,

RICHARD D. COHEN, ESQ.
Florida Bar No. 678960
21870 Cartagena Drive
Boca Raton, FL 33428
(561) 883-6227

By: /s/ Richard D. Cohen

CERTIFICATE OF COMPLIANCE

I hereby certify that this Petition for a Writ of Certiorari complies with the font requirements of Rule 9.210(a)(2), Fla.R.App.P., in that this Petition for Certiorari uses Courier New 12-point font.

/s/ Richard D. Cohen
RICHARD D. COHEN

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the forgoing has been furnished by FedEx to: Mitchel Chusid, Esq., Ritter, Chusid, et. al., 7000 W. Palmetto Park Rd., Suite 305, Boca Raton, Florida 33433, Counsel for the Respondent, on this 29th day of September, 2004.

/s/ Richard D. Cohen
RICHARD D. COHEN

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT, P.O. BOX 3315,
WEST PALM BEACH, FL 33402

February 15, 2005

CASE NO.: 4D04-3704
L.T. No.: 2003 AP 001685 AY

RICHARD D. COHEN v. WORLD OMNI FINANCIAL CORP.

Appellant/Petitioner(s), Appellee/Respondent(s).

BY ORDER OF THE COURT:

ORDERED that petitioner's February 2, 2005, Motion to Disqualify Judge Melanie G. May is hereby granted; further,

ORDERED that petitioner's motion to stay proceedings pending certiorari review is hereby denied as moot; further,

ORDERED that petitioner's motion for attorney's fees on appeal is hereby denied; further,

ORDERED that respondent's motion for attorney's fees filed November 22, 2004, is granted. On remand the trial court shall set the amount of the attorney's fees to be awarded for this appellate case. If a motion for rehearing is filed in this court, then services rendered in connection therewith, including preparation of a response may be taken into account in computing the amount of the fee; further,

ORDERED that petitioner's request for oral argument is hereby denied; further, ORDERED that petitioner's

emergency motion to expedite is hereby denied as moot; further,

ORDERED that the petition for writ of certiorari is hereby denied. *See Haines City Community Dev. v. Heggs*, 658 So. 2d 523 (Fla. 1995); *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624 (Fla. 1982).

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

Served:

Richard D. Cohen Mitchel Chusid Sharon R. Brock, Clerk

dl

/s/ Marilyn Beuttenmuller [LOGO]
MARILYN BEUTTENMULLER, Clerk
Fourth District Court of Appeal

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT

RICHARD D. COHEN	: 4DCA Case No.: 04-3704
Petitioner,	: Circuit Court Case No.: 2003 AP 001685 AY
vs.	:
WORLD OMNI FINANCIAL CORP.,	: County Court Case No.: MC 00-124-RF
Respondent	:

PETITIONER'S REQUEST, IN THE ALTERNATIVE, FOR CERTIFICATE CERTIFYING THAT A FEDERAL QUESTION WAS RAISED AND DECIDED

The Petitioner ("Cohen") hereby requests, in the alternative, a certificate certifying that a federal question was raised and therefore necessarily decided. In support of the request, the Petitioner states:

1. On February 15, 2005, this Court denied Cohen's petition for certiorari. On February 24, 2005, Cohen moved for rehearing (request for written opinion), which motion was supplemented on March 1, 2005. If Cohen's motion for rehearing (request for written opinion) is denied by this Court, Cohen will be precluded from seeking Florida Supreme Court review. *See*, Art. V, §3(b)(3), Fla. Const. At that point, Cohen's only remaining appellate remedy will be a petition for certiorari to the U.S. Supreme Court. *See*, 28 U.S.C. §1257(a).

2. Although the federal question in this case, *i.e.*, that Florida's failure to provide credit against its Sales/Use Tax on lease payments for Sales/Use Tax previously paid to another state on the same lease payments violates

the Commerce Clause of the Federal Constitution, was amply and repeatedly raised by Cohen in the County Court [App. 2][1], the Circuit Court [App. 13 and 15] and this Court (*See* Cohen's petition for certiorari herein), there is no indication from the face of any of the Florida court decisions issued in this case that the federal question was ever addressed, let alone decided, by the Florida courts [App. 5, 16, 17] (*See also*, this Court's February 15, 2005 Order denying Cohen's petition for certiorari herein).

3. U.S. Supreme Court jurisprudence provides for the practice of obtaining a certificate from the highest state court in which a federal question was raised certifying that a federal question was raised and therefore necessarily decided. Speaking for the Court in *Honeyman v. Hanan*, 300 U.S. 14, 22 (1937), Chief Justice Hughes described the function of a certificate:

> "the true function of a certificate or statement by a state court, by way of amendment of, or addition to, the record, is to aid in the understanding of the record, to clarify it, by defining the Federal question with reasonable precision, and by showing how the question was raised and decided, so that the Court upon the record as thus clarified may be able to see that the Federal question was properly raised and necessarily determined. Our decisions in cases where certificates have been found useful should be read in light of that fundamental consideration."

4. In the event that this Court denies Cohen's motion for rehearing (request for written opinion), Cohen hereby

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[1] All references to the Appendix herein refer to the Petitioner's Appendix to Petition for Certiorari.

requests, in the alternative, a certificate certifying "that a federal question was raised and decided and that that question was whether Florida's failure to provide credit against its Sales/Use Tax on lease payments for Sales/Use Tax previously paid to another state on the same lease payments violates the Commerce Clause of the Federal Constitution."

WHEREFORE, Petitioner, RICHARD D. COHEN, respectfully requests, in the alternative, a certificate certifying that a federal question was raised and decided, as aforesaid.

Respectfully submitted,

RICHARD D. COHEN, ESQ.
Florida Bar No. 678960
21870 Cartagena Drive
Boca Raton, FL 33428
(561) 883-6227

By: _____

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the forgoing has been furnished by U.S. Mail to: Mitchel Chusid, Esq., Ritter, Chusid, et. al., 7000 W. Palmetto Park Rd., Suite 305, Boca Raton, Florida 33433, Counsel for the Respondent, on this 3rd day of March, 2005.

_____
RICHARD D. COHEN

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT, P.O. BOX 3315,
WEST PALM BEACH, FL 33402

March 29, 2005

CASE NO.: 4D04-3704
L.T. No.: 2003 AP 001685 AY

RICHARD D. COHEN v. WORLD OMNI FINANCIAL CORP.

Appellant/Petitioner(s), Appellee/Respondent(s).

BY ORDER OF THE COURT:

ORDERED that petitioner's motion filed February 24, 2005, for rehearing-request for written opinion is hereby denied; further,

ORDERED that petitioner's first supplement filed March 1, 2005, to petitioner's motion for rehearing-request for written opinion is hereby denied; further,

ORDERED that petitioner's request filed March 7, 2005, in the alternative, for certificate certifying that a federal question was raised and decided is hereby denied; further,

ORDERED that petitioner's request filed March 15, 2005, for permission to reply to respondent's opposition to petitioner's request for a certificate certifying that a federal question was raised and decided is hereby denied.

I HEREBY CERTIFY that the foregoing is a true copy of the original court order Served:

Served:

Richard D. Cohen Mitchel Chusid

dl

/s/ Marilyn Beuttenmuller [LOGO]
MARILYN BEUTTENMULLER, Clerk
Fourth District Court of Appeal

2001 WL 1358013

Department of Revenue
Bureau of Technical Assistance
State of Florida

Technical Assistance Advisement 2001(A)-063
October 4, 2001

Sales and Use Tax

Motor Vehicle Leased in New York

Section 212.06(8)(a), F.S.

Section 212.06(7), F.S.

Section 212.05(1)(c)2., F.S.

Rule 12A-1.007(2)(a), F.A.C.

*** ("Taxpayer")

*** ("Lessor")

Dear *** :

This is a response to your letter of August 29, 2001, requesting a Technical Assistance Advisement (TAA) regarding the above-referenced matter. This response to your request constitutes a TAA under Chapter 12-11, Florida Administrative Code (F.A.C.), and is issued to you under the authority of Section 213.22, Florida Statutes (F.S.).

FACTS

On May 13, 1995, Taxpayer, a New York resident at the time, entered into a 36 month lease of a 1995 Range Rover Discovery in the state of New York. At the inception

of the lease, New York sales tax was paid on the full term of the lease as required by New York tax law. In July 1996, Taxpayer relocated to Florida and registered the vehicle in Florida at that time. Subsequently, Lessor began adding Florida sales tax to Taxpayer's monthly payment in the amount of $42.68. After Taxpayer refused to pay the additional Florida sales tax included in his monthly lease payment, Lessor repossessed the vehicle. Taxpayer and Lessor are currently involved in litigation over the issue at hand.

REQUESTED ADVISEMENT

Taxpayer requests advice on the application of Florida sales tax to the monthly lease payment for a vehicle that is leased and registered in New York prior to being removed and registered in Florida.

APPLICABLE LAW, ANALYSIS, AND DETERMINATION

Taxpayer has raised two arguments to support his position that Florida sales tax should not have been imposed on the monthly lease payments for the vehicle that he removed from New York and registered in Florida. In a September 17, 2001, telephone conference between Taxpayer and the Department, Taxpayer noted that in previous correspondence between the Department and himself, the Department relied on Section 212.06(8), F.S., to support its position that Florida sales tax was correctly imposed on the monthly lease payment once the vehicle was removed to Florida. Section 212.06(8)(a), F.S., provides:

> Use tax will apply and be due on tangible personal property imported or caused to be imported into this state for use, consumption, distribution, or storage to be used or consumed in this state; provided, however, that, except as provided in paragraph (b), it shall be presumed that tangible personal property used in another state, territory of the United States, or the District of Columbia for 6 months or longer before being imported into this state was not purchased for use in this state. The rental or lease of tangible personal property which is used or stored in this state shall be taxable without regard to its prior use or tax paid on purchases outside this state. (emphasis supplied)

Taxpayer stated that the application of Section 212.06(7), F.S., to his situation creates a different result than does the application of Section 212.06(8), F.S. Section 212.06(7), F.S., provides in part:

> The provisions of this chapter do not apply in respect to the use or consumption of tangible personal property or services, or distribution or storage of tangible personal property for use or consumption in this state, upon which a like tax equal to or greater than the amount imposed by this chapter has been lawfully imposed and paid in another state, territory of the United States, or the District of Columbia. . . .

Taxpayer stated that at the inception of the lease, New York sales tax of 8 1/2% was imposed and collected on the total value of the lease. Taxpayer contends that this was a "like tax," paid to another state and that pursuant to Section 212.06(7), F.S., he should be given credit for the tax paid. Taxpayer argues that the result from the application of Section 212.06(7), F.S., conflicts with the result from the application of Section 212.06(8), F.S., and based

on these inconsistent results, the Department should not have the authority to choose one result over another and impose sales tax on the monthly lease payments.

It is a cardinal rule of statutory construction that the entire statute under consideration must be considered in determining legislative intent, and effect must be given to every part of the provision under construction and every part of the statute as a whole. State v. Gale Distributors, 349 So.2d 150 (Fla. 1977). It is the Department's position that the most reasonable interpretation of Section 212.06(7) and (8) F.S., when read together, is that the credits set forth in these subsections extend to certain transactions but not to the rental and lease of tangible personal property which is used or stored in this state. Thus, the Department was correct in relying on Section 212.06(8), F.S., in its previous rulings.

Secondly, Taxpayer refers to the Department's TAA OOA-060, dated October 26, 2000, in support of his position that it was improper for Lessor to charge Florida sales tax since he was entitled to a credit for the New York sales tax previously paid to New York. Specifically, Taxpayer refers to the Department's response to questions "1(a)," "1(i)," and "1(j)" set forth in TAA OOA-060. The questions and responses are as follows:

* * *

Question 1(a):

If a leased vehicle, originally purchased for use outside the [S]tate of Florida, transfers into the [S]tate of Florida, must the lessor collect sales tax on the monthly lease payments for the period that the vehicle remains in Florida?

Response to Question 1(a):

In situations where the other state requires tax to be paid on each monthly lease payment, Florida will not allow a credit. Sales tax should be collected and remitted on each monthly lease payment when the vehicle is registered and used in Florida.

Where the other state requires the tax to be paid up-front on the full term of the lease, Florida will allow a credit only when:

1. The other state requires the tax to be paid up-front, and it is not an option;

2. The other state lawfully imposes the tax on the lessee;

3. The other state does not allow a credit or a refund of taxes paid when the vehicle is removed from that state; and,

4. The tax imposed by the other state must be a like tax, as provided in s. 212.06(7), F.S.

If the tax rate of the other state is less than the rate imposed by Florida, which would include the state tax rate of 6 percent and the county surtax rate if applicable, the monthly lease payments will be subject to the difference of the tax paid to the other state and the rate imposed by Florida. You may visit our web site at http://sun6.dms.state.fl.us/dor/for county surtax rates.

For states where the legal incidence of the tax falls on the lessor, Florida will not allow a credit even though the lessee may be contractually obligated to reimburse the lessor for this expense.

* * *

Question 1(i):

Here are states where the taxes may be paid upfront:

Arkansas	Maryland	Oklahoma
Illinois	New Jersey	South Dakota
Iowa	New York	Texas
Kentucky	North Carolina	Vermont
Maine	North Dakota	South Carolina

Does Florida recognize taxes paid upfront in any state? If not, what states are reciprocal? What happens if the upfront sales tax rate was less than 6% – would this affect the sales tax rate in Florida?

Response to Question 1(i):

In response to the first two parts of this question, as of the date of this response and according to the records we have searched, New York is the only state listed above where Florida will recognize taxes paid upfront. Regarding the third part of this question, please refer to the answer provided for Question 1.a.

Question 1(j):

If it is deemed that Florida is now reciprocal to taxes paid in another state then what date does this become effective and is this retroactive?

Response to Question 1(j):

Please refer to the answer provided for Question 1.a. Also, the effective date would be the date the original state changed its taxing statutes to impose the tax on the lessee and not the lessor. There would be no retroactive application of the credit. (emphasis supplied)

* * *

Prior to July 1, 1998, Florida law provided that a lease or rental of tangible personal property used or stored in the State of Florida was taxable irrespective of its prior use or prior taxable status in another state. Section 212.06(8)(a), F.S., is the statutory reference in this regard and provides that the purchases of aircraft, boats, mobile homes, motor vehicles, and other vehicles outside the State of Florida are granted an exemption from Florida use tax when such purchases were made six (6) months or more prior to the time the property was brought into the State of Florida. However, this exemption does not apply to the rental or lease of such property. In addition to the cited statutory language provided above, Rule 12A-1.007(2)(a), F.A.C., provides:

(2) Purchases Outside Florida.

(a) There shall be a presumption that any aircraft, boat, mobile home, motor vehicle, or other vehicle purchased in another state, territory of the United States, or the District of Columbia but titled, registered, or licensed in this state is taxable except as otherwise provided in subsection (26) of this rule. This presumption may be rebutted only by documentary evidence that the person owning the aircraft, boat, mobile home, or motor vehicle purchased the aircraft, boat, mobile home, or motor vehicle in another state, territory of the United States, or the District of Columbia six (6) months or more prior to the time it is brought into this state. In order for such property to be presumed exempt as purchased for use outside Florida, the person owning the aircraft, boat, mobile home, motor vehicle, or other vehicle must provide documentary proof that such property was used in other states, territories of the United States, or the District of Columbia for six months or longer

> under conditions which would lawfully give rise to the taxing jurisdiction of another state, territory of the United States, or the District of Columbia and any lawfully imposed tax was paid to such state, territory of the United States, or the District of Columbia before being imported into this states. However, the rental or lease of any aircraft, boat, mobile home, or motor vehicle which is used or stored in this state is taxable without regard to its prior use or tax paid on the purchase outside this state. (emphasis supplied)

During the 1998 legislative session, the Florida Legislature amended Section 212.05, F.S., to remove from the imposition of sales and use tax, certain non-commercial motor vehicle leases in excess of twelve (12) months. Chapter 98-140, Laws of Florida, effective July 1, 1998, added Section 212.05(1)(c)2., F.S., which provides:

> Except as provided in subparagraph 3., for the lease or rental of a motor vehicle for a period of not less than 12 months, sales tax is due on the lease or rental payments if the vehicle is registered in this state; provided, however, that no tax shall be due if the taxpayer documents use of the motor vehicle outside this state and tax is being paid on the lease or rental payments in another state.

Section 212.05(1)(c)2., F.S., provides for an exemption from Florida sales tax if the taxpayer can document use of the motor vehicle outside of Florida and that tax is being paid on the lease or rental payments in another state. It is important to note, however, that this provision did not go into effect until July 1, 1998. The Department referenced this law change in its discussion and analysis of the questions posed in TAA OOA-060, which is relied upon by Taxpayer in support of his position. As explained in the

answer to question 1(j), there is no retroactive application of the credit provided for in Section 212.05(1)(c)2., F.S. Thus, there is no application of the credit for transactions that occurred before July 1, 1998.

In the instant case, Taxpayer entered into the lease agreement in May 1995, well before the law change. Therefore, Lessor was correct to apply Florida sales tax to Taxpayer's monthly lease payment upon registration of the vehicle in Florida.

Taxpayer also argues that it was improper for Lessor to "pyramid" the Florida sales tax on the New York sales tax, because New York sales tax is not a taxable item under Florida law. The State of New York requires that sales tax on long-term leases of motor vehicles be paid at the inception of the lease. From the lease documents submitted by Taxpayer, it appears that Lessor calculated New York sales tax on the total value of the lease, and then added this amount, $2155.20, to the total value of the lease before dividing the sum into 36 equal monthly payments of $711.20. In the instant case, Lessor actually remitted the sales tax for Taxpayer at the lease inception and was to be reimbursed that amount by Taxpayer over the following 36 months.

The result of Taxpayer and Lessor using this method to remit sales tax on the lease is that the amount paid every month to Lessor for the sales tax reimbursement loses its identity as sales tax. This is shown very clearly in the monthly invoices from Lessor to Taxpayer. Taxpayer submitted two such invoices from Lessor. The first is the June 1996 invoice when Taxpayer was still a New York resident and the second is the July 1996 invoice when Taxpayer was a Florida resident. The June 1996 invoice

shows a contract payment amount of $711.20, no amount shown for sales tax (even though a column for sales/use tax amount was present), and a total amount of $711.20. The July 1996 invoice, after Taxpayer moved to Florida, shows a contract payment amount of $711.20, a sales/use tax amount of $42.67, and a total amount of $753.87.

Unlike the July 1996 invoice, the June 1996 invoice does not separately state the amount to be paid for rent and the amount to be paid for sales tax. The failure to separate the charges on the invoices causes the amount that Taxpayer pays to Lessor as a reimbursement for sales tax to lose its identity as sales tax. Thus, the entire amount, $711.20, becomes subject to Florida sales tax.

In conclusion, Lessor correctly applied Florida sales tax to Taxpayer's monthly lease payments for the vehicle that was leased and registered in New York prior to being removed and registered in Florida.

This response constitutes a Technical Assistance Advisement under Section 213.22, F.S., which is binding on the Department only under the facts and circumstances described in the requests for this advice, as specified in Section 213.22, F.S. Our response is predicated on those facts and the specific situation summarized above. You are advised that subsequent statutory or administrative rule changes or judicial interpretations of the statutes or rules, upon which this advice is based, may subject similar future transactions to a different treatment than expressed in this response.

You are further advised that this response, your request and related backup documents are public records under Chapter 119, F.S., and are subject to disclosure to

the public under the conditions of s. 213.22, F.S. Confidential information must be deleted before public disclosure. In an effort to protect confidentiality, we request you provide the undersigned with an edited copy of your request for Technical Assistance Advisement, the backup material and this response, deleting names, addresses and any other details which might lead to identification of the taxpayer. Your response should be received by the Department within 15 days of the date of this letter.

Sincerely,

M. Chris Lyon

Attorney

Technical Assistance & Dispute Resolution

2003 WL 22466172

Tax Appeals Tribunal
State of New York

IN THE MATTER OF THE PETITION
OF THOMAS **GALLAGHER**
for Revision of a Determination or for Refund of
Sales and Use Taxes under Articles 28 and 29
of the Tax Law for the Year 2001.
DTA No. 819115
October 23, 2003

HEARING DECISION

Petitioner Thomas **Gallagher**, 20 Sandhurst Road, Lakewood, New Jersey 08701, filed an exception to the determination of the Administrative Law Judge issued on March 20, 2003. Petitioner appeared pro se. The Division of Taxation appeared by Mark F. Volk, Esq. (Justine Clarke Caplan, Esq., of counsel).

Petitioner did not file a brief in support of his exception. The Division of Taxation filed a brief in opposition and petitioner filed a reply brief. Oral argument was not requested.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether petitioner, the lessee of a new 2000 Lexus automobile, was entitled to a refund of a prorated portion of the sales tax that he paid to New York on the total amount of lease payments due under a car lease of 39 months as a result of his change of residence from New York to New Jersey during the lease period.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

On August 21, 2000, petitioner, then a resident of Nanuet (Rockland County), New York, leased a 2000 Lexus from the New Jersey new car dealer, Lexus of Englewood. New York sales tax at the rate of 7.25% was paid in the amount of $1,399.71[1] on the total amount of lease payments due under the lease of $19,305.00 (39 months multiplied by the monthly lease payment of $495.00).

After living in New York State for 66 years, during January 2001, petitioner purchased a home in New Jersey, and on May 29, 2001, presumably after actually moving to New Jersey, registered his leased Lexus automobile in his new home state. On registering his vehicle in New Jersey, he was required to pay New Jersey sales tax of $612.80 for the 30 months remaining on the lease.

Petitioner filed a claim dated May 30, 2001 for refund of sales tax in the amount of $1,071.00. This amount was computed using the sales tax of $35.85 per month, based on the monthly payment of $495.00 and a sales tax rate of 7.25%, multiplied by the 30 months remaining on the 39-month lease after petitioner's registration of the vehicle in New Jersey and his move to this neighboring state.

The Division of Taxation (hereinafter the "Division") denied petitioner's refund claim by letter dated July 16, 2001 for the following reason:

---

[1] Sales tax at the rate of 7.25% on total lease payments of $19,305.00 computes to $1,399.61.

When a lease, an option to renew or similar provision, or a combination of these, is entered into on or after June 1, 1990, the amount due under the agreement and for the entire period covered (including renewals and/or options) will be immediately subject to sales tax.

There is no provision in the New York State Sales and Use Tax Law to allow for refund of sales tax paid on the lease of a vehicle where the lessee relocates to another state where they [sic] may also be required to pay tax.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

Since there were no facts in dispute, the Administrative Law Judge determined that the matter could be resolved by summary determination. Based upon the record, the Administrative Law Judge concluded that petitioner was not entitled to a refund of sales tax paid on his 39-month lease of his automobile despite petitioner's changing his residence from New York to New Jersey nine months into the lease period.

In analyzing the pertinent sections of the Tax Law and regulations along with three Tax Appeals Tribunal decisions on point, the Administrative Law Judge stated that all payments under a car lease for a term exceeding one year were deemed to have been paid and were subject to tax as of the date of the first lease payment. The Administrative Law Judge further reasoned that a refund or credit is only allowed for any sales tax payment that was made erroneously, illegally or unconstitutionally. The Administrative Law Judge determined that since the lessor collected and petitioner paid the proper amount of sales tax, the accelerated payment of sales tax on future

payments under a car lease did not qualify as an erroneous, illegal or unconstitutional payment. Thus, the Administrative Law Judge sustained the denial of petitioner's refund claim.

ARGUMENTS ON EXCEPTION

On exception, petitioner argues that our government was founded on the concept of no taxation without representation and, since he was not a resident of New York for 30 months of his 39-month lease period, New York State does not have a right to tax him for those months in which he lived in New Jersey. Furthermore, he questions the basis for the enactment of Tax Law § 1111(i)(A) which results in the payment of sales tax for the entire 39-month lease period as of the date of his first payment under such lease.

In opposition, the Division argues that the Administrative Law Judge's determination should be sustained in its entirety. The Division claims that petitioner has the burden to show that the tax was erroneously paid such that he is entitled to a refund. The Division states that petitioner has not sustained his burden of proof and, thus, it properly denied his refund.

OPINION

We affirm the determination of the Administrative Law Judge.

As stated by the Administrative Law Judge, there are three Tax Appeals Tribunal decisions that are on point with the facts of this case. In Matter of Torquato (Tax Appeals Tribunal, October 12, 2000), the taxpayer therein

moved to California and registered her automobile there ten months into her 36-month lease period. The taxpayer, like petitioner herein, sought a refund of the sales tax paid for the remaining 26 months of her lease where she no longer resided in New York. We upheld the Division's denial of her refund claim noting that Tax Law § 1111(i) accelerated the collection of sales tax on certain leases of motor vehicles with a duration of one year or more and, thus, the sales tax payment made by the taxpayer was properly collected and paid.

Additionally, we noted that the Division's regulations at 20 NYCRR 527.15(e) specifically provided that no refund would be allowed based upon an argument that the lease payments were unused since Tax Law § 1111(i) deems all receipts to have been paid. Thus, we concluded that the Division's interpretation of the statute was reasonable and we upheld the refund denial (see also, Matter of Moerdler, Tax Appeals Tribunal, April 26, 2001, confirmed Matter of Moerdler v. Tax Appeals Tribunal, 298 AD2d 778, 750 NYS2d 329; Matter of Miehle, Tax Appeals Tribunal, August 24, 2000).

Petitioner has not presented any legal argument which distinguishes his case from the cases cited above. Therefore, we find that, since petitioner did not prove entitlement to a refund for sales tax properly paid and collected, the Division properly denied the refund claim.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Thomas **Gallagher** is denied;

2. The determination of the Administrative Law Judge is sustained;

3. The petition of Thomas **Gallagher** is denied; and

4. The refund denial letter issued by the Division of Taxation dated July 16, 2001 is sustained.

DATED: Troy, New York

Donald C. DeWitt

President

Carroll R. Jenkins

Commissioner

RICHARD D. COHEN
12582 Torbay Drive
Boca Raton, Florida 33428
(561) 883-6227
Fax:(561)883-6146

August 31. 1998

Dennis B. Freeman, Esq.
Dennis B. Freeman, P.A.
20801 Biscayne Blvd., Suite 304
Aventura, Florida 33180

RE: World Omni Financial Corp.

Dear Mr. Freeman:

I am in receipt of you "validation letter" dated August 5, 1998 concerning the referenced matter to which this letter responds.

Please be advised that the debt which is the subject of your letter is/has been disputed in it's entirety. The facts giving rise to the dispute can be summarized as follows:

In approximately May, 1995, I leased a 1995 Land Rover Discovery. At that time, I was living in New York, and prepaid the entire 3 year lease term's worth of New York State sales tax at the inception of the lease. Approximately thirteen months later, in June, 1996, I relocated to Florida and re-registered the vehicle here in Florida. For over a year, until some time in late 1997, World Omni collected Florida sales tax on the vehicle even though the sales tax had been previously paid for the entire lease term in New York. When I discovered the double billings and double payments, I wrote to World Omni requesting a credit for the double payment and took a deduction against the lease invoice for that month [illegible]n an amount equal to the aggregate of the double

sales tax payments made up until that point in time. They refused to credit me for the double sales tax payments insisting that there was a separate sales tax liability in Florida. I responded by stating that I had no problem paying the Florida sales tax for the period that the vehicle was located/registered in Florida provided that they refunded me the unearned portion of the prepaid New York sales tax. World Omni replied by telling me to apply for a refund from New York State while at the same time telling me that New York State has a "No Refund" policy. I explained that I had no legal standing to apply for a refund since the vehicle was both titled and registered in their name and that they were the payor of the tax as far as New York State is concerned. I continued to take a deduction for the Florida sales tax portion of all further lease invoices.

In February, 1998, the vehicle experienced a complete mechanical breakdown and was towed to the Land Rover dealership in North Dade. After I was quoted a cost to repair the vehicle which was in excess of $2,000, I determined that it did not make business sense for me to proceed with the repairs at my expense given that there were only 3 months remaining under the lease. At that point, I called World Omni and told them that I would pay the remaining lease payments coming due under the lease until the expiration thereof (less credit for any prepayment and unapplied security deposit) and that they were welcome to possession of the vehicle prior to lease expiration after the rear-end repairs, as more particularly hereinafter described, were completed.

On a separate note, a few weeks prior to the vehicle breaking down, as aforesaid, the vehicle was involved in a rear-end collision. Because the woman who rear-ended me

was completely at fault and did not want to put the claim through her insurance company, she called the service department at North Dade Land Rover and authorized them to put the entire cost of repairing the rear end collision damage on her credit card (which she gave them). Before North Dade Land Rover had a chance to effectuate the repairs, a representative dispatched by World Omni showed up with a flat bed tow truck and purported to repossess the vehicle. Therefore, to the extent that the amount sought by World Omni herein includes a provision for the rear end damage, World Omni should be equitably estopped from a recovery thereof because they "repossessed" the vehicle despite their knowledge that North Dade Land Rover was given the authorization to proceed with such repairs.

At all relevant times, the lease was paid on a current basis and there was no basis For a repossession of the vehicle based upon a breach of the lease. Please note that the balance of the payments becoming due under the lease, *i.e.* the March and April, 1998 lease payments (net of sales tax) are fully offset by the last month's lease payment and one month's security deposit which were paid upon lease inception (Please note that I will need to go back to my 1995 bank statements to confirm this).

In conclusion, there are no monies due your client. Please govern yourselves accordingly.

Yours truly,

/s/ Richard D. Cohen
Richard D. Cohen

(3)

No. 04-1727

FILED
SEP 13 2005
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

RICHARD D. COHEN,

Petitioner,

v.

WORLD OMNI FINANCIAL CORP.,

Respondent.

On Petition For A Writ Of Certiorari To The Circuit Court Of The Fifteenth Judicial Circuit In And For Palm Beach County, Florida

REPLY BRIEF

RICHARD D. COHEN
21870 Cartagena Dr.
Boca Raton, Florida 33428
(561) 883-6227
Counsel of Record for Petitioner

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REPLY BRIEF

1. Respondent's assertion that the federal question was not properly raised by petitioner in the courts below is demonstrably untrue. The respondent's own appendix materials conclusively demonstrate that petitioner properly raised the federal question at every appropriate stage of the proceedings below as recited in the petition.[1] The sheer disingenuousness of respondent's assertion that the federal question was not properly raised by petitioner in the courts below is evident from the fact that as recently as March, 2005, the respondent (in its opposition to petitioner's request to the District Court of Appeal of the State of Florida, Fourth District, for a certificate certifying that a federal question was raised and decided) implicitly conceded that the federal question was indeed properly raised when it asserted that the reason that "the appellate courts have not ruled on this issue [is] because the Commerce Clause has no relevance to this action" (Rep. App. 2a).[2]

2. The fact that petitioner also argued in the courts below that he did not have a contractual obligation to pay the Florida use tax (because paragraph 3(b) of the lease (Resp. App. 4) expressly provides that sales and use taxes, having been paid upfront for the full lease term, are not applicable to the ongoing monthly payment) neither

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[1] *See* Resp. App. 51-54, 68, 78, 104, 113, 116-122, 135-137, 139, 145-155 and 163-165. References to Resp. App. herein refer to the Appendix to the Respondent's Brief in Opposition.

[2] Apparently now recognizing that the Commerce Clause is relevant to this action, respondent does not make this assertion in its Brief in Opposition herein. References to Rep. App. herein refer to the Appendix to this Reply Brief; references to Pet. App. herein refer to the Appendix to the Petition.

detracts from the fact that the petitioner properly raised the federal question nor provides an independent (let alone, adequate) state ground for the lower court's decision. In order for the trial court to conclude that petitioner's non-payment of the Florida use tax constituted a lease default, the trial court would first have to find that petitioner had *not only* a statutory obligation to pay the Florida use tax *but also* a contractual one. It is a well-established principle that "courts have a strong duty to avoid constitutional issues that need not be resolved to determine the rights of the parties to the case under consideration." *County Court of Ulster County, N.Y. v. Allen*, 442 U.S. 140, 154 (1979). With this principle in mind, the petitioner suggested to the trial court that it could avoid the statutory interpretation and related constitutional issues *if, but only if,* the court found that petitioner did not have a contractual obligation. But because the trial court found that petitioner had a contractual obligation, the trial court then had to reach the statutory interpretation and related constitutional issues.[3] The trial court proceeded to interpret the statute holding that petitioner was not entitled to credit for the New York sales tax previously paid. For the reasons set forth at length in the petition, that interpretation disregards – and thus violates – the dormant Commerce Clause.

3. Respondent's assertion that there was an independent basis for summary judgment (based on petitioner's *never-even-alleged* failure to repair the vehicle and make the final

[3] A contractual obligation to pay tax cannot possibly exist in the absence of an underlying statutory basis for the tax itself.

two monthly lease payments) is also demonstrably untrue.[4] As the trial court's finding of fact (excerpted below) makes clear, the only basis for granting summary judgment was petitioner's nonpayment of the Florida sales and use tax:

> There is no genuine issue as to any *material* fact.[5] It is uncontradicted that Cohen failed to pay the entire monthly lease payments when World Omni increased the lease payments to include a 6% sales and use tax imposed by Florida law. World Omni repossessed and sold the vehicle. Cohen alleges that he was not required to pay the Florida sales and use tax on the Lease or that he was entitled to a refund of the New York sales tax that was paid at the inception of the lease. (*emphasis supplied*) (Pet. App. 3a).

Respondent's motion for summary judgment (Resp. App. 37) further reinforces the conclusion that the sole basis upon which respondent sought summary judgment was petitioner's nonpayment of the Florida sales and use tax.

---

[4] Respondent never alleged in its complaint (Resp. App. 1) that petitioner defaulted by failing to repair the vehicle and thus, this claim was never heard, determined or adjudicated in the trial court. The complaint alleges only that petitioner "defaulted by failing to pay." Respondent's Answer Brief in the Circuit Court appeal admits "World Omni declared Cohen in default of the lease as a result of his failure to pay Florida Sales and Use Tax." Petitioner's nonpayment of the final two monthly lease payments cannot possibly serve as a basis for default since these payments did not become due until *after* respondent declared the lease in default and repossessed the vehicle.

[5] The timing of petitioner's payments (*i.e.*, his mistaken initial payment of the Florida use tax and later deduction therefor) is not material since it does not affect the total amount paid. If anything, respondent received payment sooner than it was entitled.

4. Moreover, where a state court opinion does not address or resolve the federal question, as here, the "mere possibility that the state court might have reached the same conclusion if it had decided the question purely as a matter of state law does *not* create an adequate and independent state ground that relieves this Court of the necessity of considering the federal question." *United Air Lines v. Mahin,* 410 U.S. 623, 630-31 (1973); see also *Orr v. Orr,* 440 U.S. 268, 276-77 (1979).

5. In support of its argument that the courts below correctly interpreted Fla. Stat. §212.06, respondent relies only upon the TAA's. Because the TAA's (like the decision below) are incompatible with the Commerce Clause jurisprudence of this Court, the TAA's are wrong for the same reason that the decision below is wrong. See *Oklahoma Tax Comm'n v. Jefferson Lines,* 514 U.S. 175, 194 (1995) (stating in dicta that under Commerce Clause requirements, use tax "would not apply when another State's sales tax had been previously paid or would apply subject to a credit for such payment"). Needless to say, the TAA's do not outweigh the binding precedents of this Court. And respondent does not deny that the type of transaction involved (*e.g.,* sale, lease, etc.) is irrelevant to the Commerce Clause analysis.

6. Petitioner has never claimed that the Florida statute is unconstitutional. To the contrary, the Florida statute is perfectly constitutional because it contains a provision for credit for sales taxes previously paid to another state (§212.06(7), Fla. Stat.). S[illegible] *Dep't of Revenue v. Kuhnlein,* 646 So.2d. 717, 723 (Fla. 1994) (holding that to avoid an internal consistency problem, "Florida law [referring to §212.06(7), Fla. Stat.] provides that once use tax is applicable, credit *must* be given for any "like tax"

paid to another American jurisdiction that is equal to or greater than Florida's tax"). But by ignoring this credit provision (thereby denying credit to interstate lessees for sales taxes that they previously paid to another state), the courts below, like the FLDOR in the TAA (Pet. App. 7), construes the statute in violation of the dormant Commerce Clause since such a construction operates to subject interstate lessees to cumulative sales and use tax burdens that are not similarly borne their intrastate counterparts. Significantly, respondent does not – and cannot – deny that discrimination against interstate commerce necessarily results from this construction.

7. Respondent incorrectly asserts that "the April 9, 2001 Order Granting World Omni's Motion for Final Summary Judgment on liability was not appealed", Opp. 5 n. 4. Under Florida law, an appeal from a final judgment brings up for review the correctness of all prior orders. *See* Fla. R. App. P. 9.110(h); *City of Lake Worth v. Walton*, 443 So.2d. 405 (Fla. 4th DCA, 1984). Thus, by appealing the final judgment (Resp. App. 97), petitioner appealed everything (including, without limitation, the April 9, 2001 Order).

8. Respondent points out that "the operative statute has since been amended to provide a credit where a taxpayer can document the use of his/her vehicle outside the State of Florida and that a sales tax is *being paid* in another state" (*emphasis supplied*), Opp. 14, referring to Fla. Stat. §212.05(1)(c)2. This 1998 amendment allows credit for the *contemporaneous* payment ("*being paid*") of sales tax to another state. Prior to this amendment, credit was only allowed for the *prior* payment ("*has been paid*") of sales tax to another state. *See* Fla. Stat. §212.06(7). This amendment is of no relevance to interstate lessees who,

like petitioner, previously paid sales taxes upfront to the state where their lease originated because their right to credit was already provided for under the prior statute. The statute is not – and has never been – the problem. The problem instead lies in FLDOR's (and various other state tax commissioner's) embedded policy that routinely and systematically directs its licensed dealers (including respondent dealer) to collect use tax from interstate lessees notwithstanding the statute which provides for their entitlement to credit for sales taxes previously paid to another state (and in disregard of the Commerce Clause requirements that underpin the statute). This policy remains very much extant. *See* TAA 03A-007 (February 7, 2003) (Rep. App. B).

9. The importance and substantiality of the question presented has not been denied. As demonstrated in the petition, millions of individual lease consumers throughout the nation have been – and continue to be – unconstitutionally subjected to cumulative – and discriminatory – sales and use tax burdens simply because they cross state lines. The idea that rampant systematic discrimination against interstate commerce can be tolerated in a national common-market economy whose very existence and continued prosperity depends on that commerce just cannot stand.

CONCLUSION

For the foregoing reasons and those set forth in the petition, this Court should grant the petition.

Respectfully submitted,

RICHARD D. COHEN
21870 Cartagena Dr.
Boca Raton, Florida 33428
(561) 883-6227
Counsel of Record for Petitioner

REPLY APPENDIX A

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT

RICHARD D. COHEN,

Petitioner,

vs.

WORLD OMNI FINANCIAL CORP.,

Respondent.

4DCA Case No: 04-3704
Circuit Court Case No.: 2003 AP 001685 AY
County Court Case No.: MC 00-124-RF

RESPONDENT'S OPPOSITION TO PETITIONER'S REQUEST FOR CERTIFICATE CERTIFYING THAT A FEDERAL QUESTION WAS RAISED AND DECIDED

Respondent, World Omni Financial Corp., ("World Omni"), by and through its undersigned attorneys, hereby submits its Opposition to Petitioner, Richard D. Cohen's ("Cohen"), Request, in the Alternative, for a Certificate Certifying that a Federal Question was Raised and Decided, and states as follows:

1. As detailed in World Omni's Opposition to Cohen's Motion for Rehearing and Request for Written Opinion[1] (the "Request,") Cohen is seeking yet a third review of the lower court's holding that Cohen is not entitled to a credit against the Florida sales/use tax. In the event that

[1] The undersigned has previously briefed this Court regarding the extensive background of this case. Accordingly, World Omni hereby incorporate by reference those facts as set forth in its Opposition to Cohen's Rehearing and Request for Written Opinion.

Cohen's Motion for Rehearing is denied, Cohen seeks an order certifying that a federal question has been raised and decided for the purpose of establishing entitlement to certiorari review by the United States Supreme Court.

2. In support of the Request, Cohen contends that Florida's failure to provide credit for sales/use tax previously paid to another state violates the Commerce Clause and, therefore, raises a federal question. Cohen goes on to argue that it is unclear whether this federal question was ever addressed by the appellate courts, let alone decided.

3. Stated simply, the appellate courts have not ruled on this issue because *the Commerce Clause has no relevance to this action*. As previously argued, World Omni is a private party, who under Florida law, was required to charge Cohen for Florida Sales and Use Tax under the Lease Agreement when he moved to Florida. The only issue was whether World Omni complied with Florida law, which two appellate courts have answered in the affirmative.

4. The dormant Commerce Clause applies only to "state regulation" that burdens interstate commerce and not to burdens imposed by private actors. *See Crescent Towing & Salvage Co., Inc. v. Ormet Corp.*, 720 So.2d 628, 632 (La. 1998); *Anderson v. USAir, Inc.*, 619 F.Supp. 1191 (D.C. D.C. 1985) (in order to establish a claim under the commerce clause, claimant must show the involvement of a state actor). *See also, Oregon ex rel. Dept. of Transp. v. Heavy Vehicle Electronic License Plate, Inc.*, 198 F.Supp.2d 1202 (D. Or. 2002) (non-profit corporation that operated system of electronically expedited truck inspections in various states was not state actor and, therefore, licensing agreement between corporation and private motor carrier governing use of corporation's license plate transponders

could not be deemed to impose undue burden on interstate commerce so as to be void under § 1983 and Commerce Clause).

5. If Cohen sought to challenge the constitutionality of the operative Florida Statute, he should have filed an action against or joined the Department of Revenue. *See Department of Revenue v. Kuhnlein,* 646 So. 2d 717 (Fla. 1994) (Florida residents brought an action against the Department of Revenue, not the entity that sought to impose the impact fee, challenging the constitutionality of impact fees which were imposed on cars purchased or titled in other states but subsequently registered in-state); *Barringer v. Griffes,* 1 F. 3d 1331 (2d Cir. 1993) (plaintiff filed suit against the Vermont Motor Vehicle Commissioner seeking declaratory and injunctive relief based on their claim that the Vermont Motor Vehicle Purchase and Use Tax violated the Commerce Clause).

6. This is not an appropriate venue for a constitutional challenge and, therefore, no federal question is present. Cohen is looking for yet another bite at the apple and a chance at a third appeal. Based on the foregoing, Cohen's request for a certificate certifying that a federal question was raised and decided should be denied.

WHEREFORE, World Omni's requests that the Court deny Cohen's Request, in the alternative, For a Certificate Certifying that a Federal Question was Raised and Decided, together with such other and further relief as the Court may deem just and proper.

RITTER CHUSID BIVONA & COHEN, LLP
Attorneys for World Omni Financial Corp.
7000 West Palmetto Park Road, Suite 305
Boca Raton, Florida 33433
(561) 394-2180

By: /s/ Mitchel Chusid
MITCHEL CHUSID
Fla Bar No. 879282
ALLISON KAY GRANT
Fla. Bar No. 858330

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 11th day of March, 2005 to: Richard D. Cohen, 21870 Cartagena Drive, Boca Raton, Florida 33428; and to Steven M. Goldsmith, Esq., 5355 Town Center Road, Suite 801, Boca Raton, Florida 33486.

RITTER CHUSID BIVONA & COHEN, LLP
Attorneys for World Omni Financial Corp.
7000 West Palmetto Park Road, Suite 305
Boca Raton, Florida 33433
(561) 394-2180

By: /s/ Mitchel Chusid
MITCHEL CHUSID
Fla Bar No. 879282
ALLISON KAY GRANT
Fla. Bar No. 858330

REPLY APPENDIX B

[LOGO] **State of Florida**
Department of Revenue

Sales and Use Tax	**Technical Assistance Advisements (2000 – To Date)**

SUMMARY

QUESTION: Should sales tax be imposed on a motor vehicle lease, when the vehicle was leased in New Jersey and later brought into and registered in Florida?

ANSWER – Based on Facts Below: Yes. Section 212.05(1)(c)2., F.S., provides that no tax is due if a taxpayer documents use of a vehicle outside Florida and tax is or was paid on the lease payments in another state. Section 212.06(7), F.S., provides that tax does not apply if a like tax equal to or greater than Florida tax has been lawfully imposed and paid in another state. However, under New Jersey law, tax on the lease of a motor vehicle is lawfully imposed on the lessor, not the lessee. The lessor may choose to collect the tax from the lessee, but is not required to do so. The Department's position, therefore, is that credit cannot be given for any tax paid by the lessee on the lease.

****

Feb 07, 2003

Re: Technical Assistance Advisement 03A-007
XXX ("Taxpayer")
Sales and Use Tax
Motor Vehicle Leased in New Jersey
Section 212.05(1)(c)2., F.S.
Section 212.06(7) and (10), F.S.

Dear:

This response is in reply to your January 15, 2003 petition requesting the Department's issuance of a Technical Assistance Advisement pursuant to s. 213.22, F.S., and Chapter 12-11, F.A.C., regarding the referenced matter and parties. An examination of your petition has established that you have complied with the statutory and regulatory requirements for issuance of a TAA. Therefore, the Department is hereby granting your request for issuance of a TAA.

Stated Facts

In your letter you state the following facts:

> On October 5, 2001[,] I leased an automobile in New Jersey[,] where I resided at the time. Upon relocating to Florida and registering my automobile in this [s]tate, my leasing company added Florida sales tax to my monthly invoices. It is my position that this is "double taxation" and not in accord with the intent of the Florida Statutes.
>
> The New Jersey statutes require that the lessor pay the use tax *when the property is leased.* In essence[,] taxes were paid to the [s]tate of New Jersey for the lease between me and the dealer. I further believe that one would be naive if they did not realize the tax was paid, albeit indirectly, by myself . . . [quote from Section 212.06(7), F.S.]
>
> Since the section of the Florida statute[s] is silent regarding the entity paying the tax in the other jurisdiction, I believe that the tax paid by the lessor at the time of entering into the lease with me should fulfill the requirements of this statute. Requiring Florida taxes from me should

> be considered "double taxation" and not compatible with the intent of the Florida statutes.
>
> I have previously written the Florida Department of Revenue regarding this matter and have enclosed a copy of their "unofficial" response. . . . [Emphasis in original]

In response to a request for documents by the Department, you submitted your lease agreement, motor vehicle retail order, New Jersey leased vehicle registration, Florida vehicle registration, and copies of cancelled checks showing your monthly payments.

Taxpayer's Position

Taxpayer feels that he is being inappropriately taxed twice on the lease of a motor vehicle.

Applicable Authority and Discussion

Section 212.05(1)(c)2., F.S., provides:

> It is hereby declared to be the legislative intent that every person is exercising a taxable privilege who engages in the business of selling tangible personal property at retail in this state, including the business of making mail order sales, or who rents of furnishes any of the things or services taxable under this chapter, or who stores for use or consumption in this state any item or article of tangible personal property as defined herein and who leases or rents such property within the state.
>
> (1) For the exercise of such privilege, a tax is levied on each taxable transaction or incident, which tax is due and payable as follows:

. . .

(c) At the rate of 6 percent of the gross proceeds derived from the lease or rental of tangible personal property, as defined herein; however, the following special provisions apply to the lease or rental of motor vehicles:

. . .

2. Except as provided in subparagraph 3., for the lease or rental of a motor vehicle for a period of not less than 12 months, sales tax is due on the lease or rental payments if the vehicle is registered in this state; provided, however, that no tax shall be due if the taxpayer documents use of the motor vehicle outside this state and tax is being paid on the lease or rental payments in another state.

Section 212.06(7), F.S., provides:

The provisions of this chapter do not apply in respect to the use or consumption of tangible personal property or services, or distribution or storage of tangible personal property for use or consumption in this state, upon which a like tax equal to or greater than the amount imposed by this chapter has been lawfully imposed and paid in another state, territory of the United States, or the District of Columbia. The proof of payment of such tax shall be made according to rules and regulations of the department. If the amount of tax paid in another state, territory of the United States, or the District of Columbia is not equal to or greater than the amount of tax imposed by this chapter, then the dealer shall pay to the department an amount sufficient to make the tax paid in the other state, territory of the United States, or the District of Columbia and in this

> state equal to the amount imposed by this chapter.

Section 212.06(10), F.S., provides:

> No title certificate may be issued on any boat, mobile home, motor vehicle, or other vehicle, or, if no title is required by law, no license or registration may be issued for any boat, mobile home, motor vehicle, or other vehicle, unless there is filed with such application for title certificate or license or registration certificate a receipt, issued by an authorized dealer or a designated agent of the Department of Revenue, evidencing the payment of the tax imposed by this chapter where the same is payable. A presumption of sales and use tax applicability is created if the motor vehicle is registered in this state. For the purpose of enforcing this provision, all county tax collectors and all persons or firms authorized to sell or issue boat, mobile home, and motor vehicle licenses are hereby designated agents of the department and are required to perform such duty in the same manner and under the same conditions prescribed for their other duties by the constitution or any statute of this state. All transfers of title to boats, mobile homes, motor vehicles, and other vehicles are taxable transactions, unless expressly exempt under this chapter.

Taxpayer's lease agreement contains the following language relating to tax:

> I agree to pay when due or reimburse Lessor for the following estimated amount (which may vary if I change the Vehicle's garaging address) for title/license/registration/official fees and taxes over the term of my Lease, whether paid at lease

> signing, included in my monthly payments or assessed otherwise: $1,155.45. The actual total of fees and taxes may be higher, or lower, depending on the tax rates in effect, or the value of the Vehicle at the time a fee or tax is assessed.

Taxpayer's retail order form also provides:

> 9. PAYMENT OF SALES AND USE TAXES. The price for the motor vehicle specified on the face of this Order includes reimbursement for certain Federal Excise taxes but does not include sales taxes and use taxes (Federal, State or Local) or Luxury Tax, unless expressly stated. Customer assumes and agrees to pay, unless prohibited by law, any such sales, use or occupational taxes imposed on or applicable to the transaction covered by this Order, regardless of which party may have primary tax liability. In the event Customer elects to lease the motor vehicle covered by this Order, Dealer acknowledges liability for the upfront payment of New Jersey Use Taxes, which amount shall in turn be factored into the amount of the monthly lease payment charged to the Customer.

The Department cannot determine from the lease agreement the exact amount of tax assessed on the lease of the vehicle. However, for the reasons detailed below, the amount of tax paid by Taxpayer, or even a determination that the Taxpayer paid any tax at all, on the lease is not necessary for our determination of the issue.

Under New Jersey sales and use tax law, long-term leases are treated differently than rentals for sales and use tax purposes. The lessor is considered to be the end user of the leased property and the one who is responsible for paying use tax when the property is leased. The lessor is not

required to collect sales tax from the lessee; however, nothing in the New Jersey law prohibits a lessor from increasing the lessee's monthly payment to recover this tax expense. Therefore, the Department finds that, because New Jersey tax is lawfully imposed on the lessor and not on the lessee (even though the lessee may be contractually obligated to reimburse the lessor), credit cannot be allowed as provided in Section 212.06(7), F.S.

Under Section 212.06(10), F.S., there is a presumption of use in this state if a motor vehicle is registered in this state and thus becomes subject to Florida sales tax. Based on the facts presented in your letter, Florida sales tax is due on the monthly lease payments from the time the vehicle was brought into this state.

Advisement

Florida sales tax is due on the lease of a motor vehicle entered into in New Jersey, when the vehicle is subsequently brought into Florida and registered in this state.

Closing Statement

This response constitutes a Technical Assistance Advisement under Section 213.22, F.S., which is binding on the Department only under the facts and circumstances described in the request for this advice as specified in Section 213.22, F.S. Our response is predicated on those facts and the specific situation summarized above. You are advised that subsequent statutory or administrative rule changes or judicial interpretations of the statutes or rules upon which this advice is based may subject similar future

transactions to a different treatment than expressed in this response.

You are further advised that this response, your request and related backup documents are public records under Chapter 119, F.S., and are subject to disclosure to the public under the conditions of Section 213.22, F.S. Confidential information must be deleted before public disclosure. In an effort to protect confidentiality, we request you provide the undersigned with an edited copy of your request for Technical Assistance Advisement, the backup material and this response, deleting names, addresses and any other details which might lead to identification of the taxpayer. Your response should be received by the Department within 15 days of the date of this letter.

If you have any further questions with regard to this matter and wish to discuss them, you may contact me directly at (850) 488-9669.

Sincerely,

Tammy S. Manke
Technical Assistance & Dispute Resolution

TSM/
Control No: 53420